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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES GILBERT,
Appellant,
vs.
UNIVERSITY OF TENNESSEE, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF TENNESSEE AT JACKSON

JURISDICTIONAL STATEMENT

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78 pp

QUESTIONS PRESENTED FOR REVIEW

Whether equal protection and due process permit a State Agency acting through an individual's review of a hearing record to reverse the Agency's own hearing examiner who has personally observed the witnesses when the reversal involves a liberty and/or property interest, when credibility and veracity are primarily at issue, cross-examination is limited and when the reversal is a final order of the Agency to be upheld on appeal to the State Courts pursuant to State Statute unless unsupported by substantial evidence in the record and/or other limited criteria.

LIST OF PARTIES

In addition to the parties named in the caption of the Defendants below and Appellees here are James C. Hunt, M.D., individually, and as Chancellor of the University of Tennessee Center for Health Sciences.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
LIST OF PARTIES I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
OPINIONS BELOW 1
STATEMENT OF JURISDICTION
(i) Nature of the Proceedings 2
(ii) Judgment Sought to Be Reviewed 2
(iii) Statutory Basis for Jurisdiction 2
CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS 3
STATEMENT OF THE CASE 6
REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION 12
CONCLUSION 20
APPENDIX—
A. Judgment and Opinion of Tennessee Court of Appeals, Western Section, of January 31, 1983 A1
B. Opinion of the Tennessee Supreme Court of April 4, 1983 ..... A11
C. Judgment and Opinion of Tennessee Court of Appeals, Western Section of Jackson of September 26, 1984 ..... A12
D. Opinion of the Supreme Court of Tennessee, of December 10, 1984 ..... A21
E. Findings of Fact, Conclusions of Law and Order Entered August 13, 1982, in Shelby County Chancery Court of Tennessee A22

F. Judgment and Findings of Facts and Conclusions of Law Entered September 8, 1983, in Chancery Court of Shelby County, Tennessee A33

G. Memorandum From Dr. Bozeman, Hearing Examiner, to James C. Hunt, Chancellor, Dated August 3, 1981 ..... A36

H. Final Order of James C. Hunt, Chancellor Dated September 14, 1981 ..... A42

I. Notice of Appeal to the Supreme Court of the United States Filed January 7, 1985, in the Supreme Court of Tennessee at Jackson A52

TABLE OF AUTHORITIES

Cases:

Addington v. Texas, 441 U.S. 425 (1979) 17

Allgeyer v. Louisiana, 165 U.S. 578 (1897) 12

Arnett v. Kennedy, 416 U.S. 134 (1974) 12

Board of Regents v. Roth, 408 U.S. 564 (1972) 12

Boykins v. Fairfield Board of Ed., 492 F.2d 697 (5th Cir. 1974) 15

Bishop v. Wood, 426 U.S. 341 (1976) 12-13

Connell v. Higginbotham, 403 U.S. 207 (1971) 12

Dickson v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961) 15

Frye v. Memphis State University, 671 S.W. 2d 467 (Tenn. 1984) 16

Goss v. Lopez, 419 U.S. 565 (1975) 15

Morgan v. U.S., 298 U.S. 468 (1936) 15

Morrissey v. Brewer, 408 U.S. 471 (1972) 15

Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858 (1982) 14, 15

Patterson v. Hunt, 682 S.W.2d 508 (Tenn. App. 1984) 15

Santosky v. Kramer, 455 U.S. 745 (1982) 16-17
Slochower v. Board of Ed. of New York, 350 U.S. 551 (1956) 13
United States v. Raddatz, 447 U.S. 667 (1980) 14
Wasson v. Trowbridge, 382 F.2d 807 (2nd Cir. 1967) 15
Wolff v. McDonald, 418 U.S. 539 (1974) 15
Wisconsin v. Constantineau, 400 U.S. 433 (1971) 12

Constitutional Provisions:

U.S. Constitution Fourteenth Amendment Section 1 .....3, 9, 15, 16

Federal Statutory Provisions & Supreme Court Rules:

28 U.S.C. 1257 (2) 3
Supreme Court Rule 10 3

State Statutory Provisions & Administrative Rules:

Tennessee Administrative Procedure Act, T.C.A. Section 4-5-108 et seq. 6
Tennessee Administrative Register Chapter 1720-1-5-.01-subsection 9 .....6, 15
T.C.A. 4-5-109(6) 12
T.C.A. 4-5-117(h)1-5 ..... 3, 9
T.C.A. 4-5-120 5
T.C.A. 49-8-304 16

Miscellaneous:

Ford on Evidence, Section 549, p. 2760 17
Wigmore on Evidence, Volume 930—Section 2494 footnote at p. 300 17
1 Am Jur 2d Adm. Law Section 108, p. 908 (1962) 18
1 Am Jur 2d Adm. Law Section 158, p. 962 (1962) 18

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, dated December 10, 1984 (App. D), concurring in the results of the September 26, 1984, decision of the Tennessee Court of Appeals, Western Section of Jackson (App. C), and the opinion of the Tennessee Supreme Court of April 4, 1983 (App. B), denying permission to appeal the Tennessee Court of Appeals, Western Section, decision of January 31, 1983 (App. A), are attached herein and are unreported or not yet reported. The decision of the Chancery Court of Shelby County, Tennessee, of August 13, 1982, of Chancellor Will V. Doran attached herein and labeled (App. E) and the decision of Chancellor George Lewis on the remanded issue dated September 8, 1983, is attached herein and labeled (App. F); they are not reported. The decision

of Dr. Bozeman, hearing examiner, of August 3, 1981 (App. G), and the decision of Dr. Hunt, Chancellor of the UTCHS dated September 14, 1981 (App. H) are attached and are unreported.

STATEMENT OF JURISDICTION

(i) Nature of the Proceedings

This is an appeal of a stigmatizing termination of a State employee pursuant to State statute or statutes which has been sustained as consistent with the Constitution and laws of the United States, specifically, where said statutes permit a State agency to reverse its own hearing examiner who personally observed the witnesses on questions of credibility and veracity by an individual who was not present when pursuant to State law that review is very limited and supported on the basis of any substantial evidence and other limited criteria and when the firing results in the deprivation of a constitutional liberty and/or property interest in violation of due process.

(ii) Judgment sought to be reviewed

The Judgment sought to be reviewed is the December 10, 1984, opinion of the Supreme Court of Tennessee at Jackson concurring in the results of the September 26, 1984, decision of the Tennessee Court of Appeals, Western Section at Jackson, with the Notice of Appeal filed on January 7, 1985, in the Supreme Court of Tennessee, the Court of last review, thereby affirming the Tennessee Supreme Court's prior decision of April 4, 1983, denying permission to appeal the January 31, 1983, decision of the Tennessee Court of Appeals, Western Section.

(iii) Statutory basis for jurisdiction

Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. 1257(2) and the Supreme Court Rule 10 in

that the Tennessee Administrative Procedure Act as applied to this Appellant by the Tennessee State Courts is deemed unconstitutional.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS

United States Constitution Fourteenth Amendment Section 1, in relevant part:

> 14th Amendment §1. . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated 4-5-117 (now 4-5-322), in relevant part:

> 4-5-117. Judicial review—Petition—Interim relief —Record—New evidence—Scope of review.—(a) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.
>
> (b) Proceedings for review are instituted by filing a petition for review in a chancery court having jurisdiction within sixty (60) days after the entry of the agency's final order thereon. • • •
>
> (f) The procedure ordinarily followed in chancery courts will be followed in the review of con-

tested cases decided by the agency, except as otherwise provided in this chapter.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court.

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(i) No agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or mod-

ified by the reviewing court unless for errors which affect the merits of the decision complained of.

(j) The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record. [Acts 1974 (Adj. S.), ch. 725, § 17; 1975, ch. 370; §§ 6, 19; 1978 (Adj. S.), ch. 815, § 1; 1978 (Adj. S.), ch. 938, § 13; T.C.A., § 4-523; Acts 1980 (Adj. S.), ch. 478, § 1.]

T.C.A. 4-5-120, in relevant part:

4-5-120. Proceedings before administrative judges —Hearing examiners.—(a) In any contested case any agency which prior to July 1, 1975, was allowed by law to have such a case reviewed by a hearing examiner or similar officer may direct that the proceedings or any part thereof shall be heard by an administrative judge which the agency shall provide from the members of the agency or the agency's regular employees. Proceedings before administrative judges shall be according to the provisions of this chapter, other applicable laws, and the rules of the respective agency. Whenever a contested case, or any part thereof, is heard by an administrative judge, he shall make a proposal for decision in writing which shall include findings of fact and conclusions of law made by him. Such proposals for decision shall be served on all parties of record, and each party who would be adversely affected by the proposed decision shall be given an opportunity to file exceptions and present argument in writing to the agency itself. Before the agency shall enter a final order, in such cases, the members thereof shall personally consider the entire record, or such portion thereof as may be cited by the parties and shall make its decision in

the form and manner prescribed by this chapter for decisions in contested cases.

Tennessee Administrative Register Chapter 1720-1-5-.01-subsection 9.

Final Decisions and Orders—Upon completion of the hearing, the hearing examiner shall prepare proposed findings of fact and conclusions of law and submit such proposed findings and conclusions to the Chancellor (or President). The Chancellor (or President), after reviewing the entire record, shall enter a final decision (Tennessee Administrative Register, Chap. 1720-1-5-.01(9))

STATEMENT OF THE CASE

On or about May 20, 1981, the Appellant, James P. Gilbert, was fired from his employment as cashier in the business office of the University of Tennessee Center for Health Sciences (UTCHS), effective immediately. The termination was allegedly based on the purchase and possession of illegal drugs on University premises. It was alleged that on a number of occasions during a period extending from March, 1980, until the termination of his employment with the University he unlawfully solicited, purchased and took possession of marijuana, quaaludes, and speed from a University of Tennessee employee under his supervision, Ms. Denise Bobbitt. It was further alleged that all but one or two of such transactions occurred in his personnel office in the cashier's office in the administrative building of the University of Tennessee for Health Sciences. That after a request for a hearing, a hearing was conducted by Dr. Samuel R. Bozeman, hearing examiner, in accordance with the contested case provisions of the Tennessee Administrative Procedure Act, T.C.A. Section 4-5-108 et seq. In response to Appellant's coun-

sel's request for a more specific statement, University counsel, Ron Leadbetter, wrote on June 22, 1981, stating in part that it was not possible to specify a date and time during which drug transactions took place, but they took place between Mr. Gilbert and Ms. Bobbitt on various occasions beginning in the month of March or April of 1980 and at two to four week intervals thereafter. It was alleged that Gilbert purchased marijuana on two or three occasions during this period, qualudes on one or two occasions and speed on at least ten occasions. It was further stated that all transactions took place at Mr. Gilbert's office at UTCHS. (See App. E).

At the hearing held on July 1, 1981, at the UTCHS in Memphis, Tennessee, Dr. Bozeman presided and testimony was given under oath by witnesses. On August 3, 1981, Dr. Bozeman sent out a Memorandum to Chancellor Hunt with copy to Gilbert stating his Findings of Facts and Conclusions and reasons for his findings, which state in part, "That Gilbert was not guilty of charges filed against him and that he should be reinstated to his former position with all back pay." (App. G, p. A40). Dr. Bozeman, who heard and saw the witnesses, disbelieved the sole witness who came forth with any real testimony against Appellant, Gilbert, because he found she testified only in generalities and that she refused to be cross-examined, that she was under indictment, that she was considered an habitual liar by all of her co-workers, two of whom were witnesses called on behalf of the University of Tennessee. Dr. Bozeman stated as follows:

> "The four ladies worked in the same office as Ms. Bobbitt. They do not trust her, thought she did not tell the truth, would say or do anything to make herself look better; had no knowledge of Gilbert using drugs nor of Ms. Bobbitt selling them, would

point a finger at anyone if it would help her. She obviously had no credibility with these ladies." (App. G, p. A39).

Dr. Hunt, Chancellor of UTCHS, however, reversed his own hearing examiner by letter dated September 14, 1981, and styled Final Order, referred to Denise Bobbitt as the chief witness against him and the sole witness claiming to have first-hand knowledge of the matters underlying the charge, noting, she was currently under indictment for felonious sale of marijuana and quaaludes; he found the charges to be fully documented in the record finding Ms. Bobbitt's testimony to be trustworthy and credible for several reasons including that she was under criminal indictment and initially plead not guilty to the criminal charges for which she was indicted and that although admitting that there was evidence that Ms. Bobbitt has not always been an honest, forthright person, there was no evidence that she does more than fabricate tales for the purpose of enhancing her own image among her fellow workers, and perhaps others, that there was no evidence that she lies or exaggerates for the purpose of making herself look worse; and therefore, felt that the record supports her credibility under the circumstances in which her testimony was given. Dr. Hunt also stated that Dr. Bozeman was correct that Ms. Bobbitt repeatedly refused to answer cross-examination questions but noted that she did so on the advice of legal counsel because this might lay the groundwork for further charges against her by the District Attorney's Office. (App. H, pp. A43-A49). On October 29, 1981, a Petition for Certiorari and Review was filed in the Chancery Court of Tennessee for the Tenth Chancery District at Memphis (Shelby County Chancery), raising the issues concerning substantive and procedural due process having been violated by the

Agency reversing its own hearing examiner and also raising the issue of a lack of cross-examination and that the actions of Dr. Hunt were arbitrary and capricious, not supported by substantial evidence and in general violation of T.C.A. 4-5-117(h) 1-5. Service was made upon the Attorney General of Tennessee of this initial petition and to all proceedings thereafter. On August 13, 1982, Chancellor Wil V. Doran found that to the extent of the Administrative Procedure Act permits an Agency acting through an individual to enter a final order which can reverse the decision of a hearing examiner based primarily on credibility issues and is subject to review on appeal on the basis of lack of substantiality of evidence and when the reversal results in a serious deprivation the due process clause of the Fourteenth Amendment is violated and the procedure unlawful. Further, that there was a right to confrontation and cross-examination of witnesses with said right not sufficiently complied with whenever the person rendering the decision does not personally observe the witnesses when rendering his decision reverses a hearing examiner who has done so where credibility is in issue. (App. E, p. A30). As one of the standards of review under the Tennessee Administrative Procedure Act consisted of, among other things, whether there was substantial evidence to support a finding, the Chancellor went on to hold that there was substantial evidence to support the hearing examiner, Dr. Bozeman's findings, and as such, held the hearing unlawful until Dr. Hunt reversed the hearing examiner which thereby denied Gilbert due process of law and as such, reversed Dr. Hunt's decision and reinstated Gilbert with full back pay to his employment with the University. (App. E, pp. A31-A32). The University of Tennessee appealed, and the Court of Appeals, Western Section, by decision dated January 31, 1983, said the Tennessee Administrative Procedure

Act was constitutional and that the correct standard of review was to see whether there was any substantial evidence to support Dr. Hunt and not Dr. Bozeman, as Dr. Hunt's decision was the Agency's decision and remanded the case back to the Chancery Court of Shelby County for such a determination. On February 24, 1983, application for permission to appeal that decision was filed with the Tennessee Supreme Court which was denied on April 4, 1983, per curiam by the Supreme Court of Tennessee at Jackson. On August 11, 1983, the case was argued before George T. Lewis, Chancellor (successor Chancellor to Chancellor Doran), on the remanded issue with the finding by Chancellor Lewis that the administrative decision firing Gilbert should be affirmed concluding that on the basis of the record before him Dr. Hunt could have decided this case either way and that there is substantial in the record supporting his decision in favor of the University of Tennessee in dismissing Gilbert. The issues of due process were re-raised at that time as noted in Chancellor Lewis's opinion. (App. F, pp. A28-A29). The decision was entered on September 8, 1983, and on October 4, 1983, was appealed to the Court of Appeals of Tennessee, Western Section, which by opinion dated September 26, 1984, affirmed the lower Court in finding there to be substantial evidence and again rejected the due process arguments stating that their former opinion was res judicata. (See App. C). The timely application for permission to appeal was filed to the Supreme Court of Tennessee, which on December 10, 1984, considered the application for permission to appeal and the entire record in this cause and concurred in the results only in a per curiam decision. (App. D). On January 7, 1985, notice was filed in the Supreme Court of Tennessee that an appeal would be taken to the United States Supreme Court. (App. I).

The Tennessee Supreme Court, in this case's attempted first appearance before it, declined permission to appeal the first decision of the Tennessee Court of Appeals, which held that due process was not violated by the procedures employed in this case. After the case was remanded to the Shelby County Chancery Court with those issues preserved, the Court of Appeals for Tennessee ruled that those issues again raised were res judicata. The Supreme Court of Tennessee then issued its opinion of December 10, 1984, which stated that they had considered the entire record in this cause and concurred in the results only. While they again declined permission to appeal, it is quite clearly stated that they reviewed this matter and thus the notice was filed in that Court. It is also noteworthy that the constitutional issues were preserved and that the Appellant in this instance could well have prevailed on the factual issues which may have precluded the necessity of the urging of this appeal before this Court. Also, that may well have been the Tennessee Supreme Court's thinking in declining to hear the first appeal. In any event, all State Court remedies have now been fully exhausted and unless the decisions below are reversed by this Court, it will deal a severe blow to the Appellant and others like him from fundamental due process violations by State agencies in cases of protected employment.

REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

James Gilbert was employed at the University of Tennessee since 1976 and had received promotions from an associate accountant to assistant accountant to the cashier's position. Pursuant to the University of Tennessee Center for Health Sciences personnel procedure manual, Gilbert was entitled to procedural due process including the rights of cross-examination. He was also entitled to contest the charges under the Uniform Administrative Procedure Act, with the procedures conducted under same. In that act, including T.C.A. 4-5-109(6), he may conduct such cross-examination of witnesses as are required for full and true disclosure of the facts. Although the Appellees have contended that the Appellant does not have a property interest they have conceded in oral argument before the Tennessee Court of Appeals in this case's first appearance that the Appellant, Gilbert, did, in fact, have a liberty interest entitling him to due process. This is based on the fact that he is charged with an offense, the purchase of drugs, at his place of employment, and more particularly as the cashier of a medical center, which would quite obviously seriously damage his standing, reputation and associations in the community. Thus it is submitted under *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) he is entitled to a due process hearing. See also *Connell v. Higginbotham*, 403 U.S. 207 (1971), and *Arnett v. Kennedy*, 416 U.S. 134 (1974), indicating that liberty is offended by dismissal from employment based upon an unsupported charge. For "occupational liberty" see also *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). While Appellees have disputed the property interest of Appellant, it is asserted that under *Bishop v. Wood*, 426 U.S. 341

(1976), a property interest in employment can be created by ordinance or implied contract and it is asserted here that the University Personnel Procedure manual (See also App. E, p. A27) and other attendant circumstances of this case fall within the ambit of an implied contract. However, as the Appellees had conceded there to be a liberty interest, this case focused on what process was due more so than whether any was due and a liberty interest in public employment should more than suffice for the questions presented. See *Slochower v. Board of Ed. of New York*, 350 U.S. 551 (1956).

After Appellant contested the allegations against him in this case, the University of Tennessee through its Chancellor, Dr. Hunt, appointed Dr. Bozeman, hearing examiner, to hold a hearing under the Uniform Administrative Procedure Act of the State of Tennessee. As a result of that hearing on August 3, 1981, Dr. Bozeman made certain findings of fact, conclusions and reasons for his findings ruling in favor of the Appellant and finding that there was no plausable explanation for the witness against Gilbert other than she could apparently say or do anything in an attempt to look good, wanted to have an affair with Gilbert, would point the finger at anyone if she thought she could get away with it. He concluded that it appeared that the witness had some vindictive reason for making charges against, Gilbert, possibly the embezzlement charges that were placed against her. He further concluded that Gilbert was considered a good and capable employee who had received three substantial promotions in approximately four years and several months employment and recommended that he be reinstated with full back pay. (See App. G, pp. A40-A41). Dr. Hunt reviewed the record and disagreed with his own hearing examiner's credibility findings for the reasons set out in more detail in the Statement of Facts. A Petition

for Certiorari and Review was filed in the Chancery Court of Shelby County and Chancellor Doran who first heard the case found in his favor on due process principles, as set out more fully in the Facts. He went on to hold that there was substantial evidence to support the hearing examiner, Dr. Bozeman, and held the hearing was lawful until Dr. Hunt reversed his hearing examiner and therefore reinstated the Appellant with full back pay to his employment with the University. The University of Tennessee appealed and the Tennessee Court of Appeals in its decision stated that they were not aware of any decision which held that due process requires a final decision maker to hear and see the witnesses and analogized it to Appellate Court's having its hands tied in considering irregular factual matters that were before the Court only on the record. (App. A). The Court of Appeals went on to cite the Supreme Court in *United States v. Raddatz*, 447 U.S. 667 (1980), for the proposition that the final decision maker has the broad discretion to accept, reject or modify a fact finder's findings and cited the *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S.Ct. 2858 (1982) case for the proposition that the Constitution not only permits but may require a decision maker to decide a case independently of the recommendations of the fact finder. In fact, the *Northern Pipeline* case and the *Raddatz* case stood for the proposition that the Court has sustained the use of adjunct fact finders as long as those adjuncts were subject to sufficient control by an article III District Court; in the *Raddatz* case a Magistrate's proposed findings and recommendations were subject to de novo review by the District Court and the Court in *Northern Pipeline* held where the ultimate decision making authority was retained by the District Court in the enforcement of constitutional rights as opposed to rights created by Federal law must remain vested in the District Court

and not the Bankruptcy Court. It is asserted that the *Northern Pipeline* case stands strongly in favor of the Appellant's position particularly where, as here, the Court's review of the agency was not subject to a de novo review. See also *Morgan v. U.S.*, 298 U.S. 468 (1936), for the holding of the one who hears must decide and, in a recently published decision concerning the expulsion of dental students involving the same institution, UTCHS, the Tennessee Courts held that Chancellor Hunt's decision was the final decision from an appeal of an administrative board or honor council pursuant to the Tenn. Admin. Comp. § 1720-1-5 and that, "By either method of appeal, Chancellor possessed the power for *de novo* review." *Patterson v. Hunt*, 682 S.W.2d 508 (Tenn. App. 1984, permission to appeal denied by Tenn. S.Ct. October 29, 1984).

It is also noteworthy that this case embraces the issue of cross-examination. Here, without dispute, the chief and virtually sole witness against the Appellant herself refused, based on Fifth Amendment privileges, to answer questions. Both the hearing examiner, Dr. Bozeman, and Dr. Hunt, Chancellor of UTCHS, recognize this and the issue of limited cross-examination was raised consistently throughout the proceedings. The question of what procedural due process at a minimum is due an employee, who under state law meets the requirements sufficient to provide a protected interest is suggested by *Wolff v. McDonald*, 418 U.S. 539 (1974) holding confrontation and cross-examination essential where a person may lose his job in society. This holding is in need of further delineation with parameters set forth as to what is minimally permissible where, as here, the witness refused to be fully examined and was disbelieved in part because of it. Dr. Bozeman held she refused to answer twenty-six questions of importance. (See App. G). On the contrary, some United States Circuit Courts of Appeals have held the Fourteenth Amendment to

the United States Constitution does not require confrontation and cross-examination of witnesses by the accused, much less by counsel, in an analogous type school expulsion hearing. See *Dickson v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961); *Boykins v. Fairfield Board of Education*, 492 F.2d 697 (5th Cir. 1974); *Wasson v. Trowbridge*, 382 F.2d 807 (2nd Cir. 1967). These cases are follow-ups on the legacy of *Goss v. Lopez*, 419 U.S. 565 (1975), and *Morrissey v. Brewer*, 408 U.S. 471 (1972) with *Goss* providing that mere attendance at a State University is an interest protected by the due process clause of the Fourteenth Amendment and *Brewer* asking the question what process is due once it is determined that due process applies. While this case is certainly not a student expulsion case, it does have a very well structured set of facts along with a serious deprivation that may help establish some of the guidelines for other due process type litigation, particularly, where as here a more serious deprivation than *Goss* is involved.

It is also interesting to note the same Tennessee Supreme Court in *Frye v. Memphis State University*, 671 S.W. 2d 467 (Tenn. 1984) upheld a Tennessee statute, specifically T.C.A. 49-8-304 which provided for a de novo judicial review of administrative decision in cases involving tenured faculty members at a State University. It is suggested that the equal protection clause of the Fourteenth Amendment is violated by this preferential treatment to faculty members at a State University over employees with expectations of continued employment, particularly where their firing is stigmatizing.

Thus, this case mainly concerns the constitutional dimensions of the standard of proof requisite to uphold a deprivation. While this varies based upon the nature of the interest affected, it is clear that this Court is sensitive to that issue as indicated by its decision in *Santosky v.*

Kramer, 455 U.S. 745 (1982), which found that clear and convincing evidence standard was constitutional and required in involuntary parental rights termination. And as stated in *Addington v. Texas*, 441 U.S. 425 (1979), the standard of proof in cases involving individual rights reflects the value society places on individual liberty. In this case, we have a combined liberty-property interest to be considered and the Court's standard of proof for deprivation should be addressed as there are no firm guidelines fully articulated by this Court. It is also clear that once this case was remanded to the Shelby County Chancery Court for determination as to whether or not Dr. Hunt's decision could be sustained under the "appropriate" judicial standard of review, that, Chancellor Lewis held that the case could have been sustained either way and supported either way. This is even less than the minimum criteria under commonly accepted definitions of substantial evidence, but, even so was sustained by the Appellate Courts. Substantial evidence has been defined as "evidence that is of sufficient force and character that it will with reasonable and material certainty with precision compel a conclusion one way or the other. It must force or reduce the mind to pass beyond a suspicion or conjecture". See Ford on Evidence, Section 549, page 2760. Also see Wigmore on Evidence, Volume 930—in section 2494 footnote at page 300, holding that substantial evidence is "evidence furnishing a substantial basis of fact from which the fact and issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences". Thus, it is submitted that it is the duty of this Court to pass on the issue whether or not substantial evidence, which can easily become "any" evidence, is a sufficient basis to uphold a decision maker's review of a hearing record on credibility

issues when in doing so he reverses a decider who disbelieves that evidence and when that is the sole basis on which to affect a deprivation.

It is also clear that the legislature may offend against the Constitution when it confers unlimited discretion upon administrative agencies. A statute or ordinance which grants absolute discretion in administrative agencies bestows arbitrary powers and is therefore an unlawful delegation of legislative powers. See 1 Am Jur 2d Adm. Law Section 108, page 908 (1962). It is also noteworthy and distinctive in this case that the legislature permitted a single individual as head of the agency to make this decision as opposed to a board or commission. See 1 Am Jur 2d Section Adm. Law 158, page 962 (1962). Thus, it is asserted that the delegation of authority in this type of case to a single person's review on credibility of a hearing record to be upheld under the limited criteria of review was also an abuse of discretion by the legislature.

While this is not a brief, it is important to urge that the strength of this case lies in its facts as they are the subject of completely opposite interpretations by the hearing officer and record reviewer. All four co-workers in the cashier's office testified that Denise Bobbitt, who Dr. Hunt believed, was a liar. Rebecca Lucas, Senior Accounting Clerk, and four-year employee, testified she didn't take anything Denise Bobbitt said as true and felt like Denise was on drugs and capable of embezzlement. (Hearing Transcript 134-137). Sally Murphree, a fifty-six year old person, said Denise was an habitual liar and doesn't know how to tell the truth, likes the limelight of pointing an accusing finger, would point it at anyone, even Dr. Hunt if she thought she could get away with it. (HT 139-148). Three year employee Diane Cramer was called by the University and testified on cross-examination that she

formed an opinion on Denise's honesty and it was that she is not a person to be trusted. (HT 162, 163). Marilyn Coleman, also a witness for the University, testified it was her personal opinion that she didn't have a lot of trust in everything Denise said. (HT 161, 162). Gilbert, on the other hand, categorically denied the charges and while he speculated it could be vindictiveness, did not know why she would be vindictive toward him. He didn't know whether she thought he was involved in bringing charges of embezzlement against her, although admitted he was part of the procedure, but not instrumental. He testified he never had any criminal charges brought against him and had received promotions since 1976; he was, and is, married with two children, and an honorably discharged serviceman. (HT 108-113).

This is a case of great importance, not only to the Appellant, but to others to follow. The Appellate Courts of Tennessee, purportedly following decisions of this Court, have held that the due process clause of the Fourteenth Amendment permits, perhaps even requires, a hearing examiner to form his own opinion on credibility and veracity issues when making a decision that can affect constitutional rights.

This Court has never directly ruled on the questions presented by this appeal. It has never decided the correctness of a state agency reversing its own hearing examiner on questions of credibility and veracity when review is had by state courts under a very limited review, in this instance, one of substantial evidence, abuse of discretion, arbitrary and capricious, etc. It has ramifications for other hearings of constitutional nature. The questions are thus substantial and of importance as to require plenary consideration for their resolution. Probable jurisdiction should be noted.

CONCLUSION

For the above reasons the questions presented are substantial, meriting review.

Respectfully submitted,

MARC I. BARETZ
Attorney at Law
P. O. Box 1107
West Memphis, Arkansas 72301
(501) 732-4102
Attorney for Appellant

APPENDIX

APPENDIX A

(Filed January 31, 1983)

IN THE COURT OF APPEALS
STATE OF TENNESSEE
WESTERN SECTION AT JACKSON

JAMES P. GILBERT, *Plaintiff-Appellee,* vs. UNIVERSITY OF TENNESSEE, JAMES C. HUNT, M.D., Individually and as Chancellor of UNIVERSITY OF TENNESSEE CENTER FOR HEALTH SCIENCES, *Defendants-Appellants.*	)	Shelby Chancery No. 3

JUDGMENT

The decision of the Chancery Court of Shelby County is reversed. The entire matter is remanded to the Chancery Court of Shelby County for a review of Chancellor Hunt's decision, in accordance with the standard of review stated in T.C.A. §4-5-117 (now T.C.A. §4-5-322). Costs taxed to the Appellee.

/s/ Summers
Summers, Sp.J.

Concur:

/s/ Nearn
Nearn, P.J., W.S.

/s/ Crawford
Crawford, J.

(Filed January 31, 1983)

IN THE COURT OF APPEALS
STATE OF TENNESSEE
WESTERN SECTION AT JACKSON

JAMES P. GILBERT, *Plaintiff-Appellee,*	)	
vs.	)	From the Chancery Court Shelby County No. 3
UNIVERSITY OF TENNESSEE, JAMES C. HUNT, M.D., Individually and as Chancellor of UNIVERSITY OF TENNESSEE CENTER FOR HEALTH SCIENCES, *Defendants-Appellants.*	)	Honorable Wil V. Doran, Chancellor

FOR THE PLAINTIFF-APPELLEE:

Marc I. Baretz
of West Memphis, Ark.

FOR THE DEFENDANTS-APPELLANTS:

William M. Leech, Jr.
Attorney General of
Nashville, Tenn.

R. Stephen Doughty
Assistant Attorney General of
Nashville, Tenn.

Beauchamp E. Brogan of
Knoxville, Tenn.

Ronald C. Leadbetter of
Knoxville, Tenn.

REVERSED AND REMANDED
OPINION RELEASED: JAN 31 1983

Paul R. Summers, Judge

NEARN, Concur
CRAWFORD, Concur

OPINION

This is a direct appeal from a ruling by the Chancery Court of Shelby County, Tennessee. The action originally began in that court under the "contested cases" provision of The Uniform Administrative Act (hereinafter referred to as APA), T.C.A. §§ 4-5-108—4-5-120.[1]

In a letter dated May 20, 1981, Robert L. Blackwell, Vice-Chancellor for Business And Finance of The University of Tennessee Center for the Health Sciences, advised James P. Gilbert, plaintiff-appellee, that his employment as cashier in the University's business office would be immediately terminated. This termination was based on "the purchase and possession of illegal drugs on University premises." Gilbert was afforded a hearing, pursuant to the provisions of the APA, to contest his termination.

Pursuant to T.C.A. §4-5-120(a), Dr. James C. Hunt, Chancellor of the University, appointed Dr. Samuel R. Bozeman, a member of Chancellor Hunt's staff, to conduct a hearing. Dr. Bozeman was to present the findings, conclusions, and reasons resulting from the hearing to Chancellor Hunt for his consideration; following which the Chancellor would make a final decision. Chancellor

---

1. T.C.A. §§4-5-109—4-5-133 were transferred or repealed by Acts of 1982 (adj.S.) Ch. 874. T.C.A. §4-5-120, here involved, was repealed by §36 of the Acts of 1982, Ch. 874. For new law, see T.C.A. §4-5-301, *et seq.*

Hunt informed Gilbert by letter of Dr. Bozeman's appointment and specifically stated:

> Following the conclusion of the hearing, the hearing examiner will present to me for consideration his findings, conclusions and reasons. Following my review of the hearing examiner's report, I will announce my decision (which shall constitute a "final order" within the meaning of Section 117 of the Act). . . .

The hearing was conducted and a transcript of the hearing was prepared. On August 3, 1981, Dr. Bozeman forwarded his findings, conclusions and recommendations to Chancellor Hunt. It was Dr. Bozeman's conclusion that Gilbert was not guilty of the charges filed against him, and that he should be reinstated in his former position.

After receiving the findings and recommendations of Dr. Bozeman, Chancellor Hunt reviewed the record and concluded that Gilbert was guilty of the charge against him. The Chancellor then filed a most lengthy final order, detailing the basis for his decision and disagreement with the hearing examiner. The trial court below commented on the letter as follows:

> On September 4, 1981, Dr. Hunt wrote a letter to Mr. Gilbert stating in part that he had carefully reviewed the record in this matter as well as Dr. Bozeman's findings and recommendations and that he could not agree with Dr. Bozeman's findings. He found the charges to be fully documented and it was his decision to uphold the termination of Mr. Gilbert's employment. The specific findings and reasons in support of his conclusion are as follows:
>
> * * *

Thereafter, pursuant to T.C.A. §4-5-117, Gilbert filed his petition with the Chancery Court of Shelby County, seeking judicial review of Dr. Hunt's decision. The complete record was filed with the Court, and both parties moved for summary judgment on the basis of that record.

Following oral argument, the trial court submitted its findings of fact and conclusions of law and it found that the University had followed the procedures of the APA in effecting Gilbert's termination. However, the Court further held that T.C.A. §4-5-120(a), which requires the agency, acting through an individual other than the hearing examiner, to enter the final order, violated the substantive and procedural due process rights of the plaintiff. The trial court stated that the plaintiff's due process rights under the Fourteenth Amendment were violated, because the APA vested the final decision-making authority in someone other than the hearing examiner. The Court stated as follows:

> This case was considered without objection as a contested case entitled to a hearing prior to termination. It falls within the purview of T.C.A. §4-5-12-(a) . . .
>
> *Pursuant to said statute, Dr. Hunt personally considered the record and issued a final order on behalf of the agency*[3] which contradicted and reversed the finding of hearing examiner, Bozeman's decision. This Court doth find that to the extent that the Administrative Procedure Act, specifically T.C.A. §4-5-120, permits and/or requires the agency acting through an individual to enter a final order which can reverse the decision of a hearing examiner based primarily on credibility issues and is only subject to review on appeal on the basis of lack of substantiality of evidence, and when said reversal results in a serious deprivation,

> then the due process clause of the Fourteenth Amendment as applicable to the states is violated and the procedure employed unlawful . . . This does not mean that the agency cannot affirm a decision of the hearing examiner in terminating the employment of a person, but is confined to the facts of this case where a reversal is involved. While there may be substantial evidence to support either Dr. Bozeman's and/or Dr. Hunt's decisions, this Court only finds that there is substantial evidence to support Dr. Bozeman's findings.
>
> * * *
>
> . . . Gilbert's hearing was lawful until Chancellor Hunt reversed the hearing examiner, thereby denying Gilbert due process of law. . . .

The Court then ordered that Chancellor Hunt's final order be set aside and that Gilbert be reinstated in his "position as cashier in the business office of UTCHS with compensation of all wages, salaries and fringe benefits due him since the day he was terminated May 20, 1981. . . ."

This appeal followed and the defendants contend that there was no basis for the Court's decision; that T.C.A. §4-5-120(a) is constitutional and does not violate plaintiff's substantive or procedural due process rights; and that Chancellor Hunt's decision is lawful which prevents Gilbert's reinstatement under the standard of review set forth in T.C.A. §4-5-117 (now T.C.A. §4-5-322).

This court is not aware of any decision which has held that due process requires a final decision-maker to hear and see the witnesses. If that rule were so, any appellate court would have its "hands tied" in considering irregular factual matters that were before the court only on the record.

T.C.A. §4-5-120(a) clearly states:

> . . . Before the agency shall enter a final order, in such cases, the members thereof shall personally consider the entire record, or such portion thereof as may be cited by the parties and shall make its decision in the form and manner prescribed by this chapter for decision in contested cases.
>
> * * *

The University's regulations, approved by the Attorney General, filed with the Office of the Secretary of State, and published in the Tennessee Administrative Registry, as required by law, implement the procedure for hearing contested cases under the APA. These regulations expressly provide:

> Final Decisions and Orders—Upon completion of the hearing, the hearing examiner shall prepare proposed findings of fact and conclusions of law and submit such proposed findings and conclusions to the Chancellor (or President). The Chancellor (or President), after reviewing the entire record, shall enter a final decision (Tennessee Administrative Register, Chap. 1720-1-5-.01(9)).

Prior to the administrative hearing in this case, plaintiff was specifically advised by Chancellor Hunt that the hearing examiner would present his findings, conclusions, and reasons to him (Chancellor Hunt) following the hearing. The plaintiff was instructed that the Chancellor would review all reports and then would announce his decision. Plaintiff at no time prior to his suit in Chancery Court objected to such proceedure. Contrary to the decision of the trial judge below, the law on this topic is crystal clear that administrative agencies are not bound

to accept the findings and recommendations of hearing examiners.

The U. S. Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) expressly considered a federal circuit court decision which held that the due process provisions of the Fifth and Fourteenth Amendments required a decision-maker "personally to hear the controverted testimony ('where credibility is crucial to the outcome')." *Id.*, 100 S.Ct. at p. 2411. The Supreme Court rejected this ruling and reversed the Court of Appeals, saying:

> Generally, the ultimate fact-finder in administrative proceedings is a commission or board, and such trier has not heard the witnesses testify (citation omitted). While the commission or board—or an administrator—may defer to the findings of the hearing officer, that is not compelled. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 350-351, 58 S.Ct. 904, 912-913, 82 L.Ed. 1381 (1938); *Morgan v. United States*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936); *Utica Mutual Insurance Co., v. Vincent*, 375 F.2d 129, 132 (Ca. 2) (Friendly, J.) cert. denied, 389 U.S. 839, 88 S.Ct. 63, 19 L.Ed.2d 102 (1967). (*Id.*, 100 S.Ct. at pp. 2414-2515).

The final decision-maker has the "broad discretion to accept, reject or modify the fact-finder's findings." *Id.*, 100 S.Ct. at p. 2415. Similarly, the U. S. Supreme Court recently confirmed that the constitution not only permits, but may require, a decision-maker to decide a case independently of the recommendations of the fact-finder. *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, ... U.S. ....., 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

Justice Fones, speaking for the Tennessee Supreme Court in *McMinnville Freight Line, Inc. v. Atkins*, 514 S.W.2d 725 (Tenn. 1974) also touched on this subject when he wrote:

> Appellant further contends that due process under both the State and Federal Constitutions require that, "he who hears must decide." We have examined all of the authorities relied upon by appellant and find that, with respect to administrative bodies the constitutional requirements of fundamental fairness, relevant here, are delineated in the following quote from Morgan v. United States, 298 U.S. 468, at 481, 56 S.Ct. 906, at 912, 80 L.Ed. 1288, at 1295:
>
> > ". . . Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, *The officer who makes the determinations must consider and appraise the evidence which justifies them.*" (Emphasis supplied).

We must therefore hold that T.C.A. §4-5-120(a) is constitutional and does not violate the plaintiff's substantial and procedural due process rights in the manner in which it was applied. As a result, we sustain the issue presented for review by the defendant as to this question.

The trial court below stated that "While there may be substantial evidence to support either Dr. Bozeman's and/or Dr. Hunt's decisions, this Court only finds that there is substantial evidence to support Dr. Bozeman's findings." This holding was improper because Chancellor

Hunt's decision was the final agency decision. It was his decision, not Dr. Bozeman's findings, that was subject to review according to the standards of T.C.A. §4-5-117 (now T.C.A. § 4-5-322).

Therefore, the decision of the Chancery Court of Shelby County is reversed. The entire matter is remanded to the Chancery Court of Shelby County for a review of Chancellor Hunt's decision, in accordance with the standard of review stated in T.C.A. §4-5-117 (now T.C.A. §4-5-322). Costs taxed to the Appellee.

/s/ Summers,
Summers, Sp. J.

Concur:

/s/ Nearn
Nearn, P.J., W.S.

/s/ Crawford
Crawford, J.

APPENDIX B

Filed April 4, 1983)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JAMES P. GILBERT, *Appellant,* vs. UNIVERSITY OF TENNESSEE, JAMES C. HUNT, M.D., INDIVIDUALLY, AND AS CHANCELLOR OF THE UNIVERSITY OF TENNESSEE CENTER FOR HEALTH SCIENCES, *Appellee.*	)	Shelby Equity

IN RE: APPLICATION FOR PERMISSION TO APPEAL OF JAMES P. GILBERT

Upon consideration of the application for permission to appeal and brief in support thereof of James P. Gilbert, the answer of the University of Tennessee, James C. Hunt, M.D., Individually, and as Chancellor of the University of Tennessee Center for Health Sciences, the opinion of the Court of Appeals and the record in the cause,

Permission to appeal is denied at the cost of appellant.

PER CURIAM

APPENDIX C

(Filed September 26, 1984)

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JAMES P. GILBERT, *Plaintiff/Appellant,* **v.** UNIVERSITY OF TENNESSEE, et al., *Defendants/Appellees.*	)	Shelby Equity

JUDGMENT

This cause was regularly heard and considered by the Court, and IT IS NOW ORDERED that the judgment of the trial court be affirmed.

Costs in this cause are taxed to the plaintiff, for which execution may issue, if necessary.

ENTER: SEP 26 1984

/s/ Tomlin
Tomlin, J.

/s/ Nearn
Nearn, P.J., W.S.

/s/ Highers
Highers, J.

(Filed September 26, 1984)

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JAMES P. GILBERT,	)	
Plaintiff/Appellant,	)	Shelby Equity
v.	)	
UNIVERSITY OF TENNESSEE,	)	Hon. Wil V. Doran
et al,	)	Chancellor
Defendants/Appellees.	)	

MARC I. BARETZ, of West Memphis, Ark., Attorney for Plaintiff/Appellant.

BEAUCHAMP E. BROGAN, General Counsel, The University of Tennessee, Knoxville, and RONALD C. LEADBETTER, Associate General Counsel, Attorneys for Defendants/Appellees.

AFFIRMED

OPINION FILED: SEP 26 1984

TOMLIN, J.

This action originated under the "contested cases" provision of the Uniform Administrative Procedures Act, Tennessee Code Annotated §§ 4-5-108 to 4-5-120 (hereinafter called "APA") by which plaintiff challenged his dismissal as an employee of the University of Tennessee Center for the Health Sciences. Plaintiff is appealing from a decree of the Chancery Court of Shelby County affirming the action of the chancellor of the Health Sciences Center (hereinafter "HSC") teminating his employment on the ground of gross misconduct. Three issues are presented by this appeal: (1) whether there is any substantial or material evidence to support the action of the chancellor; (2) whether the chancellor was in error

in not admitting into evidence a letter written by counsel for the university to the District Attorney General after the hearing before the hearing examiner; and (3) whether the reversal of a hearing examiner by an agency head on nothing more than the record of the hearing examiner afforded plaintiff due process. We dispose of this last issue by simply stating that it was presented to this Court in an earlier appeal of this case and by an opinion filed January 31, 1983, it was decided in favor of the university. Application for permission to appeal in that case was denied in April, 1983. Therefore, our former opinion is *res judicata* as to this issue. As to the remaining two issues, we find that they are without merit and affirm.

Inasmuch as this is the second time this case has been before us, we will review only such facts as are necessary to consider the issues presented. For a more thorough discussion and understanding of the entire litigation we refer to the case of *James P. Gilbert v. University of Tennessee, et al.*, 8 T.A.M. 9-16.

I. PROCEDURAL HISTORY.

Upon being notified of the termination of his employment as cashier at HSC, plaintiff brought this proceeding pursuant to the APA. As requested by plaintiff, a hearing was had before a hearing examiner appointed by the agency head, the chancellor of the HSC. After hearing all the proof, the examiner found that plaintiff was not guilty of the charges, which involved the purchase and possession of drugs on university premises, and recommended that plaintiff be reinstated to his position. After reviewing the entire record, the HSC chancellor reversed the decision of the hearing examiner and ordered plaintiff's employment terminated.

Again, following the APA procedures, plaintiff's suit was reviewed in the Chancery Court of Shelby County, which held that a final order reversing the decision of a hearing examiner who had observed the demeanor and credibility of the witnesses was unconstitutional. That decision resulted in an appeal to this Court. We reversed the chancellor and remanded the case for further proceedings in accordance with that opinion. On remand the chancellor reviewed the entire record in accordance with the appellate procedures set forth in the APA, whereupon he entered an order affirming the decision of the HSC chancellor to terminate plaintiff's employment. That brings us to a consideration of the facts relevant to this appeal.

On or about May 20, 1981, the plaintiff, cashier at the HSC, was given a notice of employment termination effective that same date. The termination was based on the alleged purchase and possession of illegal drugs on university premises by plaintiff. Plaintiff initiated a hearing pursuant to the provisions of the APA. The chancellor of the HSC appointed a member of his staff to preside as hearing officer. Several witnesses were called, including a Mrs. Denise Bobbitt, who was employed under Mr. Gilbert in the cashier's office at the HSC. It is this record that the HSC chancellor had before him to review prior to reaching his decision to terminate the plaintiff. It is the same record that was reviewed by the chancery court below and now by this Court.

As we are obliged to do, we have reviewed that record in its entirety. The only actual witnesses to the transactions bringing about the plaintiff's dismissal were the plaintiff himself and Mrs. Denise Bobbitt. Obviously, the plaintiff denied any wrongdoing. On the other hand, Mrs. Bobbitt testified that on several occasions the plain-

tiff came to her requesting that she furnish him with drugs. She stated that she in fact sold him marijuana and, on occasion, qualudes. These transactions took place on the university campus. She also testified that she had seen the plaintiff take pills that he identified to her as being "speed." In addition, a police officer in the security department of the HSC testified that prior to Mrs. Bobbitt's being arrested and charged with any criminal activities, she confided in him that she sold drugs to the plaintiff.

Although at the time of plaintiff's hearing Mrs. Bobbitt was under indictment for illegal activity in drugs, none of the events for which she had been indicted involved the possession and/or sale of drugs on the university campus, or her activities with the plaintiff. Furthermore, Mrs. Bobbitt testified, as did an official of the HSC, that no deal of any type had been struck with the District Attorney General in order to obtain favorable testimony from Mrs. Bobbitt, who testified voluntarily as a witness against the plaintiff.

Several of Mrs. Bobbitt's co-workers testified to the effect that she frequently told lies, but that they were types of lies to make her "look better." Chancellor Hunt, in his findings, disregarded this testimony, noting that the testimony of Mrs. Bobbitt was against her legal interests, and rather than being designed to make her look good, it not only made her look worse, but could likely subject her to further criminal prosecution.

T.C.A. § 4-5-117 describes the standard of review by which a final administrative decision is to be reviewed by chancery court. It reads in part as follows:

> (h) The court may affirm the decision of the agency or remand the case for further proceedings.

> The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> . . . .
>
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (5) Unsupported by evidence which is both substantial and material in the light of the entire record.
>
> In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

The chancellor below had before him the transcript of the testimony before the hearing examiner as well as the findings of fact made by the agency head, the HSC chancellor. In making his decision, the HSC chancellor obviously weighed the evidence on questions of fact. However, the above-quoted statute clearly mandates that the chancellor is not to substitute his judgment for that of the agency. The chancellor below found:

> On the basis of the record before him Dr. Hunt could have decided this case either way . . . there is substantial evidence in the record supporting his decision in favor of the University of Tennessee in dismissing the plaintiff.

The scope of review prescribed for the chancery court in T.C.A. § 4-5-117 has been held to be the same scope of review to which the appellate courts are required to use on appeal. *C.F. Industries v. Tennessee Public Service*

Commission, 599 S.W.2d 536 (Tenn. 1980); *Humana of Tennessee v. Tennessee Health Facilities Commission,* 551 S.W. 2d 664 (Tenn. 1977).

The term "substantial evidence" is a term seldom used by our judiciary, although we frequently talk in terms of "any material evidence" and "the preponderance of evidence." This term has been construed quite frequently in cases interpreting a parallel provision in the Federal Uniform Procedures Act. For mutual edification we quote but a few of those interpretations which we feel will give a broader understanding of its use. Substantial evidence is "more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Daniel v. Gardner,* 404 F.2d 889, 890 n.1 (4th Cir. 1968) (quoting *Laws v. Celebrezze,* 368 F.2d 640, 642 (4th Cir. 1966). "Evidence is 'substantial' if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion." *John W. McGrath Corp. v. Hughes,* 264 F.2d 314, 316 (2d Cir.) *cert. denied,* 360 U.S. 931 (1959). For purposes of reviewing an agency decision, " 'substantial evidence' means 'enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' " *Missouri-Kansas-Texas Railroad v. United States,* 632 F.2d 392 (5th Cir.) *cert. denied,* 499 U.S. 1005 (1980). As was stated in *Ward v. Harris,* 515 F. Supp. 859 (W.D. Okla. 1981), "substantial evidence is less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* at 862.

Applying this criterion to the record before us, we cannot say that the decisions of the agency head and the chancellor below were "unsupported by evidence which is

both substantial and material." Furthermore, a concurrent finding between the agency and the trial court on any issue of fact is conclusive upon this Court. *Blue Ridge Transportation v. Hammer*, 203 Tenn. 398, 313 S.W.2d 433 (1958). It is clear from reading the record that the chancellor below concurred in the finding of the agency head that insofar as the drug transactions between plaintiff and herself, Mrs. Bobbitt testified truthfully at the hearing. Thus, this finding is binding on the court and again, reinforces our conclusion that the finding below was supported by substantial and material evidence.

II. THE REFUSAL TO ADMIT POST-HEARING CORRESPONDENCE.

Plaintiff contends that the court below was in error in refusing to admit into evidence a letter written after the administrative hearings from counsel for the University of Tennessee to the Shelby County District Attorney. Plaintiff sought admission of the letter to show that there had been some sort of a "deal" between the university, the state and Mrs. Bobbitt for her to testify adversely to him. At the administrative hearing, both Mrs. Bobbitt and an officer of the university testified that no agreement of any kind had been discussed or considered in order to influence her testimony. Furthermore, plaintiff introduced no evidence of any kind at the hearing to rebut this testimony.

We think the chancellor below was correct in refusing to admit this letter into evidence for several reasons. First, it does not in any way affect the merits of the case against the plaintiff. Secondly, the letter on its face does nothing more than advise the district attorney of the fact that Mrs. Bobbitt cooperated with the university in prosecuting charges against the plaintiff. Lastly, inasmuch as it was

not part of the record in the administrative hearing, it does not qualify in the exception for the taking of additional evidence under T.C.A. 4-5-117(g), which reads: "The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court." Since there is no claim or evidence that any irregularities existed in the administrative proceedings, this section is clearly applicable.

For the reasons stated above, the decree of the chancellor below is affirmed. Costs in this cause are taxed to the plaintiff, for which execution may issue, if necessary.

/s/ Tomlin
Tomlin, J.

/s/ Nearn
Nearn, P.J., W.S. (Concurs)

/s/ Highers
Highers, J. (Concurs)

APPENDIX D

(Filed December 10, 1984)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JAMES P. GILBERT, *Plaintiff-Appellant,* v. UNIVERSITY OF TENNESSEE, ET AL., *Defendants-Appellees.*	)	Shelby Equity

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied, with concurrence in the results only.

PER CURIAM

APPENDIX E

(Entered August 13, 1982)

NO. 88739-2

IN THE CHANCERY COURT OF TENNESSEE
FOR THE TENTH CHANCERY DISTRICT
AT MEMPHIS

JAMES P. GILBERT,
Plaintiff,

vs.

UNIVERSITY OF TENNESSEE, JAMES C. HUNT, M.D., INDIVIDUALLY, AND AS CHANCELLOR OF UNIVERSITY OF TENNESSEE CENTER FOR HEALTH SCIENCES,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ENTERED

On the 23rd day of October, 1981, James P. Gilbert (hereinafter referred to as Gilbert) filed his Petition for Certiorari and Review against the Defendants, University of Tennessee, James C. Hunt, M.D., Individually, and James C. Hunt as Chancellor of the University of Tennessee Center for Health Sciences (hereinafter rferred to as UTCHS). A Writ of Certiorari was issued to the Defendants to certify and transmit to the Chancery Court on or before forty-five (45) days from service, the original or a certified copy of all records and proceedings taken in the matter for the Judge's review. Process was had upon all parties including the Attorney General's Office. Within forty-five (45) days, the record consisting of transcripted testimony was so transmitted and on November 18, 1981, the Defendants filed an Answer and a Motion

for Summary Judgment in response to the Petition filed herein. On December 2, 1981, the Plaintiff filed a Response to the Motion for Summary Judgment and a Motion for Summary Judgment. The case was submitted to the Court for final argument on the record on January 11, 1982. The Plaintiff, Gilbert, was represented by Marc I. Baretz, of West Memphis, Arkansas, and the Defendants were represented by Ronald C. Ledbetter of the University of Tennessee, Knoxville and Memphis, Tennessee. There was no additional testimony received. From all of the above and the statements and arguments of counsel, the Court makes the following findings of fact:

1. On or about May 20, 1981, the Plaintiff, James P. Gilbert, was fired from his employment as cashier in the business office of the University of Tennessee Center for Health Sciences, effective May 20, 1981. The termination was allegedly based on the purchase and possession of illegal drugs on University premises. The charge was considered by the University as gross misconduct. (Transcript's Exhibit 1). Gilbert was advised that should he desire a hearing he was to notify James E. Stockdale in personnel, in writing on or before May 27, 1981. On May 27, 1981, Dr. Hunt, Chancellor of UTCHS, wrote Mr. Gilbert acknowledging that Gilbert requested a hearing in connection with the termination and stating that his termination was based on: "purchase and possession of illegal drugs on the University premises". Further, that said charge constitutes a violation of University Personnel Policy 525-POL which provides for a discharge of employees guilty of "bringing onto or using illicit drugs on University premises . . . and such other *similar acts involving intolerable behavior by the employee.*" Specifically, it is alleged that on a number of occasions during a period extending from approximately March, 1980, until

the termination of your employment with the University, you unlawfully solicited, purchased and took possession of marijuana, qualudes and speed from a University of Tennessee employee employed under your supervision, Mrs. Denise Bobbitt. It is further alleged that all but one or two of such transaction occurred in your personal office in the cashier's office in the Administrative Building of the University of Tennessee Center for Health Sciences. (Transcript Exhibit 2) Gilbert was advised that a hearing would be conducted on Wednesday, July 1, 1981, at UTCHS in Memphis, Tennessee. That the hearing would be conducted by Dr. Samuel R. Bozeman, Hearing Examiner, in accordance with the contested case provisions of the Tennessee Uniform Administrative Procedures Act, Tennessee Code Annotated Sections 4-5-108 et seq. On or about June 16, 1981, Gilbert's counsel, Marc Baretz, wrote Ronald Ledbetter, Associated General Counsel of the University of Tennessee and asserted that the charges set out in Dr. Hunt's letter of May 27, 1981, stating that the offenses occurred sometime between March of 1981 and May of 1981, were not sufficiently definite regarding the date, time and place involved, and requesting additional information prior to the hearing. Further, the names and addresses of all witnesses to be called and the substance of their anticipated testimony was requested. (Transcript Exhibit 3). On June 22, 1981, Ron Ledbetter, Counsel for U.T., responded to the letter of June 16, 1981, stating in part that it was not possible to specify a date and time which drug transactions took place but that they took place between Mr. Gilbert and Mrs. Bobbitt on various occasions beginning in the month of March or April, 1981, and at two to four week intervals thereafter. It was alleged that Gilbert purchased marijuana on two or three occasions during this period, qualudes on one or two occasions, and speed on at least ten occasions. It

was further stated that all transactions took place at Mr. Gilbert's office at UTCHS. (Transcript Exhibit 4).

2. A hearing was held at 9:00 A.M. on July 1, 1981, at the UTCHS in Memphis, Tennessee. Dr. Bozeman, who was personally appointed by Chancellor Hunt, presided at the hearing. (Affidavit of Chancellor Hunt attached to Def.'s Motion for Summary Judgment). Testimony was given, under oath by the following persons on behalf of the University: 1) Denise Bobbitt, former UTCHS employee; 2) Mr. Robert Blackwell, Vice Chancellor of Business and Finance, UTCHS; 3) Ms. Diane Cramer, UTCHS employee, cashier's office; 4) Ms. Marilyn Coleman, UTCHS employee, cashier's office; 5) Mr. Dan Miller, UTCHS employee, financial aid; 6) Officer Tom West, UTCHS security office. Testimony was given on behalf of Mr. Gilbert by: 1) Mr. James P. Gilbert, UTCHS employee; 2) Ms. Rebecca Lucas, UTCHS employee, cashier's office; 3) Ms. Sally Murphree, UTCHS employee, cashier's office. On August 3, 1981, Dr. Bozeman sent a memorandum to Chancellor Hunt with the following findings of fact and conclusions and reasons for his findings, with a copy of said memorandum being sent to counsel for both parties. His decision is as follows:

(See Appendix G)

3. On September 14, 1981, Dr. Hunt wrote a letter to Mr. Gilbert stating in part that he had carefully reviewed the record in this matter as well as Dr. Bozeman's findings and recommendations and that the could not agree with Dr. Bozeman's findings. He found the charges to be fully documented and it was his decision to uphold the termination of Mr. Gilbert's employment. The specific findings and reasons in support of his conclusion are as follows:

(See Appendix H)

4. On December 2, 1981, within sixty days of Dr. Hunt's decision, the petition for certiorari and review was so filed. The petition stated that the Plaintiff was aggrieved by the actions of the Defendant dismissing him from his employment which was arbitrary and carpricious and violative of his rights to substantive and procedural due process as guaranteed under the due process clause of the Fourteenth Amendment to the United States Constitution and guaranteed under the Uniform Administrative Procedure Act TCA 4-5-108 et. seq. and as further guaranteed under the University Personnel Procedure manual. It was alleged that Chancellor Hunt's final order of September 14, 1981, totally disregarded the findings of facts and conclusions and recommendations of the hearing examiner based apparently upon a review of the record and that the administrative findings of facts, conclusions and decisions of the hearing examiner, Dr. Bozeman, should be accorded full weight under the law requiring a lack of substantiality of evidence prior to reversing said findings. It was further alleged that as Dr. Hunt was not personally present with the opportunity to observe the witnesses that his findings should be reversed as the rights of the Plaintiff were prejudiced with the findings, conclusions of or said decision in violation of Constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted its exercise of discretion; or unsupported by evidence which is both substantial and material in light of the entire record. It was alleged that the Plaintiff suffered irreparable injuries to his person as a result of his wrongful termination and loss of job including the imminent loss of his home, credit and employability. It was requested that Plaintiff be reinstated to his former position and compensated for all back wages, salaries, fringe benefits due him and the decision

of Dr. Hunt be set aside and reversed. Additionally, compensatory and punitive damages were requested. The Defendants in their Answer denied that Plaintiff was terminated unlawfully and asserted that his termination was in strict conformity to substantive and procedural requirements of the Administrative Procedure Act TCA 4-5-101 et. seq. The Defendants did agree that the Plaintiff was employed as a cashier at the University of Tennessee Center for Health Sciences and that during his almost five years employment at the UTCHS has received three substantial promotions and never before had any type of charges filed against him. They also admitted that the University of Tennessee is an educational institution owned and operated by State of Tennessee, managed and controlled by a board of trustees appointed by the Governor pursuant to TCA 49-3301 et. seq., and that UTCHS is a division of the University of Tennessee.

5. This Court does find and there is no dispute that the Plaintiff, Gilbert, was employed as a cashier for the UTCHS and that during his almost five (5) years employment at the UTCHS had received three (3) substantial promotions and never before had any type of charges filed against him. Under the provisions of the University's Personnel Procedure manual, an employee discharged for improper job behavior, gross misconduct, has a right to a hearing under the guidelines of the contested case provisions of the Uniform Administrative Procedure Act TCA Section 4-5-108 through 4-5-120 (UTCHS Personnel Procedure Section 500, 525 PR3). This Court doth further find that the University of Tennessee is an educational institution owned and operated by the State of Tennessee, managed and controlled by a board of trustees appointed by the Governor pursuant to TCA 49-3301 et. seq., and that UTCHS is a division of the University of Tennessee.

6. The Court is of the opinion that the decision of Chancellor Hunt reversing the hearing examiner, Dr. Bozeman's decision has prejudiced the rights of Gilbert because the findings of Chancellor Hunt and his conclusion and decision are in violation of Gilbert's rights to substantive and procedural due process. Specifically, Chancellor Hunt's decision is reversed based on TCA 4-5-117(h)(1)(2) and (3) as the employee, Gilbert, had a legal right to due process in his termination. In this case, Dr. Bozeman heard and viewed the witnesses and based primarily on the lack of credibility of the witness, Denise Bobbitt, disbelieved her; he further found that she did refuse to answer many questions of importance. Under due process, the right of confrontation and cross examination of witnesses and an opportunity to be heard are integral, particularly, where credibility is in issue. Chancellor Hunt's unilateral decision to reverse his own hearing examiner without being present at the hearing and where the reversal of the hearing examiner's decision results in a serious deprivation, must therefore be reversed. Here, Gilbert as the cashier of UTCHS, was fired allegedly due to the purchase of drugs while on duty, resulting in loss of employment, good name, and effecting his future employability. Chancellor Hunt, in entering a final order on behalf of the agency, did so pursuant to TCA 4-5-120 wherein he personally considered the record and made his decision. To the extent that the Administration Procedure Act permits and/or requires the agency to enter such a final order which can reverse the decision of its own hearing examiner on questions of credibility issues and is only subject to judicial review on appeal on the basis of lack of substantiality of evidence and when said reversal results in a serious deprivation, then the due process clause of the Fourteenth Amendment as applicable to the states is violated and the procedure employed un-

lawful. Therefore, the errors aforedescribed effect the merits of the decision complained of in this case.

7. On the above and foregoing findings of fact the Court makes the following conclusions of law:

1) There being no dispute over jurisdiction or venue of this cause, the Court assumes jurisdiction pursuant to TCA 4-5-101 et. seq.; particularly, TCA 4-5-117 grants exclusive jurisdiction for judicial review under this chapter.

2) This case was considered without objection as a contested case entitled to a hearing prior to termination. It falls within the purview of TCA 4-5-120(a) which reads as follows:

> 4-5-120. Proceedings before administrative judges - Hearing examiners.-(a) In any contested case any agency which prior to July 1, 1975, was allowed by law to have such a case reviewed by a hearing examiner or similar officer may direct that the proceedings or any part thereof shall be heard by an administrative judge which the agency shall provide from the members of the agency or the agency's regular employees. Proceedings before administrative judges shall be according to the provisions of this chapter, other applicable laws, and the rules of the respective agency. Whenever a contested case, or any part thereof, it heard by an administrative judge, he shall make a proposal for decision in writing which shall include findings of fact and conclusions of law made by him. Such proposals for decision shall be served on all parties of record, and each party who would be adversely affected by the proposed decision shall be given an opportunity to file exceptions and present argument in writing to the agency itself. Before the agency shall

> enter a final order, in such cases, the members thereof shall personally consider the entire record, or such portion thereof as may be cited by the parties and shall make its decision in the form and manner prescribed by this chapter for decisions in contested cases.

3) Pursuant to said statute, Dr. Hunt personally considered the record and issued a final order on behalf of the agency which contradicted and reversed the finding of hearing examiner, Bozeman's decision. This Court doth find that to the extent that the Administrative Procedure Act, specifically TCA 4-5-120, permits and/or requires the agency acting through an individual to enter a final order which can reverse the decision of a hearing examiner based primarily on credibility issues and is only subject to review on appeal on the basis of lack of substantiality of evidence, and when said reversal results in a serious deprivation, then the due process clause of the Fourteenth Amendment as applicable to the states is violated and the procedure employed unlawful. Under due process there is the right to confrontation, cross examination of witnesses and the opportunity to be heard with said rights not sufficiently complied with whenever the person rendering the decision does not personally appear and observe the witnesses when in rendering his decision reverses a hearing examiner who has done so in cases such as this where a serious deprivation is at stake and credibility is at issue. This does not mean that the agency cannot affirm a decision of the hearing examiner in terminating the employment of a person, but is confined to the facts of this case where a reversal is involved. While there may be substantial evidence to support either Dr. Bozeman's and/or Dr. Hunt's decisions, this Court only finds that there is substantial evidence to support Dr. Bozeman's findings.

4) Under TCA 4-5-117 (1981 Supp.):

> The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are: 1. In violation of Constitutional or Statutory provisions; 2. In excess of the Statutory authority of the agency; 3. Made upon unlawful procedure; 4. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or 5. Unsupported by evidence which is both substantial and material in light of the entire record.

5) Additionally, under TCA 4-5-117(i) (1981 Supp.); No agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or modified by the reviewing court unless for errors which effect the merits of the decision complained of.

6) That Gilbert's hearing was lawful until Chancellor Hunt reversed the hearing examiner, thereby denying Gilbert due process of law. As such, this Court is of the opinion that Chancellor Hunt's decision must be reversed and Gilbert reinstated to his position as cashier with UTCHS with compensation of all wages, salaries and fringe benefits due him since the day of his termination; the errors aforedescribed effect the merits of the decision.

IT IS, THEREFORE BY THE COURT, CONSIDERED, ORDERED & ADJUDGED that the final order of Chancellor Hunt dated September 14, 1981, be set aside and

reversed and that the Plaintiff, James P. Gilbert, be restored to his position as cashier at the Business Office of UTCHS with compensation of all wages, salaries and fringe benefits due him since the day he was terminated May 20, 1981. It should be noted, however, that no monetary judgment is awarded against the Defendant, James C. Hunt, M.D., individually. Costs are assessed against the Defendants for which let execution issue.

/s/ Wil V. Doran
Wil V. Doran, Chancellor

Entered this 13 day of August, 1982.

APPROVED AS TO FORM:

/s/ Marc I. Baretz
Marc I. Baretz
Attorney for Plaintiff

/s/ Ronald C. Leadbetter
Ronald C. Leadbetter
Attorney for Defendants

APPENDIX F

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

JAMES P. GILBERT,	)	
Plaintiff,	)	
v.	)	No. 88739-2
THE UNIVERSITY OF TENNESSEE	)	
ET AL.,	)	
Defendants.	)	

JUDGMENT

This cause came on to be heard on August 11, 1983, before the Honorable George T. Lewis, Chancellor, without the intervention of a jury. And now, having considered the petition of the plaintiff, the answer of the defendants, and the entire record, and after having heard and considered the argument of counsel, the court finds that the administrative decision of the defendants should be affirmed, and that judgment should be entered in favor of the defendants.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the administrative decision of the defendants be affirmed and that judgement be entered in favor of the defendants. It is further ordered that the Court's Findings Of Fact And Conclusions Of Law entered this date, be incorporated herein by reference as if copied verbatim herein. It is further ordered that the cost of this cause be taxed to the plaintiff for which execution shall issue, if necessary.

Enter this 8th day of Sept., 1983.

/s/ George T. Lewis
George T. Lewis
Chancellor

Approved:

/s/ Marc I. Baretz
Marc I. Baretz
Attorney for Plaintiff

/s/ Ronald C. Leadbetter
Ronald C. Leadbetter
Attorney for Defendants

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

JAMES P. GILBERT,	)	
Plaintiff,	)	
v.	)	No. 88739-2
THE UNIVERSITY OF TENNESSEE	)	
ET AL.,	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves a Petition for Review pursuant to the contested case provisions of the Tennessee Uniform Administrative Procedures Act, Tennessee Code Annotated §§ 4-5-108, et seq. (now recodified as Tennessee Code Annotated § 4-5-301, et seq.). Plaintiff alleges that defendants have acted arbitrarily and capriciously and that the decision of Dr. Hunt in terminating plaintiff's employment with The University of Tennessee is unsupported by evidence that is both substantial and material in the light of the entire record and is in violation of plaintiff's constitutional right to substantive and procedural due process. Further, plaintiff proffered a July 7, 1982 letter from Ron Leadbetter, University of Tennessee counsel, to Denise Bobbitt to be made part of the record and stated it had

only come to plaintiff's counsel inadvertently while looking through Denise Bobbitt's criminal file as counsel had a similar criminal case and was looking over what type motions had been filed and this letter came to his attention, the discovery of which was subsequent to submission of this case to Chancellor Doran.

FINDINGS OF FACT

The Court, after reviewing this matter, has concluded that on the basis of the record before him Dr. Hunt could have decided this case either way and that there is substantial evidence in the record supporting his decision in favor of The University of Tennessee in dismissing the plaintiff.

CONCLUSION OF LAW

That the letter of July 7, 1982 from Ron Leadbetter is not admitted into evidence as it was not part of the original record considered by Dr. Hunt. Further, that the Court is of the opinion that the decision of Dr. Hunt was supported by evidence that is both substantial and material in the light of the entire record and as such under the scope of review of Tennessee Code Annotated § 4-5-117(h) is hereby affirmed.

ENTERED this 8 day of Sept., 1983.

/s/ George T. Lewis
George T. Lewis, Chancellor

APPENDIX G

MEMORANDUM

TO: Dr. James C. Hunt
FROM: Samuel R. Bozeman, Ph.D.
SUBJECT: Case of James P. Gilbert
DATE: August 3, 1981

At your request, a hearing under the Uniform Administrative Procedures Act of the State of Tennessee was held in the case of Mr. James P. Gilbert. Discharged from the position of Cashier in the Business Office by Mr. Robert Blackwell. Mr. Gilbert was charged with the "purchase and possession of illegal drugs on University premises".

"Specifically, it is alleged that on a number of occasions during a period extending from approximately March, 1980 until the termination of your employment with the University, you unlawfully solicited, purchased and took possession of marijuana, quaaludes and speed from a University of Tennessee employee employed under your supervision, Ms. Denise Bobbitt. It is further alleged that all but one or two of such transactions occurred in your personal office in the cashier's office of the administration building at the University of Tennessee Center for the Health Sciences." Such charges, if true, constitutes a violation of the University Personnel Policy 525-POL, which provides for discharge of employees guilty of "bringing onto or using illicit drugs on University premises —and such other *similar* acts involving intolerable behavior by an employee".

Mr. Gilbert was terminated by Mr. Blackwell under date of May 20, 1981, "your last work day and last day for which you will be paid, will be May 20, 1981".

The hearing took place at 9:00 a.m. on July 1, 1981 in room 301 of the Hyman Building. All testimony was given under oath, administered by Ms. Anna Kay Poe, Court Reporter. In addition, the proceedings were taped by me as hearing officer and the tapes are in my possession (approximately 4 1/2 hours). Those individuals in attendance and appearing were:

Mr. Ronald C. Leadbetter, Assistant General Counsel U.T.

Ms. Karen Brock, Attorney U.T.

Mr. Marc Baretz, Attorney for Mr. Gilbert

Mr. Joseph Dailey, Attorney for Ms. Bobbitt

Mr. Charles M. Holt, Attorney for Ms. Bobbitt

Ms. Denise Bobbitt, former UTCHS employee

Mr. James P. Gilbert, former UTCHS employee

Mr. Robert Blackwell, Vice Chancellor for Business and Finance UTCHS

Ms. Rebecca Lucas, UTCHS employee Cashier's Office

Ms. Sally Murphree, UTCHS employee Cashier's Office

Ms. Diane Cramer, UTCHS employee Cashier's Office

Ms. Marilyn Coleman, UTCHS employee Cashier's Office

Mr. Dan Miller, UTCHS employee Financial Aid

Officer Tom West, UTCHS Security Office

Present by not appearing:

Ms. Debbie Whitley, UTCHS Personnel Services and observer

FINDINGS OF FACT

1. Ms. Bobbitt testified that on several occasions, Mr. Gilbert came to her and asked if she could get drugs for him; that she did obtain marijuana and occasionally quaaludes and brought them to his office at UTCHS. He paid a small sum each time. On one occasion, she

saw him taking a pill and said that he told her it was speed.

2. Ms. Bobbitt would not testify as to the dates of the transactions nor to the number of times she had obtained and/or delivered drugs to Mr. Gilbert.

3. Ms. Bobbitt resigned her position as Senior Fee Control Clerk in the Cashier's Office at the end of April, 1981, because of the illness of her daughter. She had also been arrested under indictments and the University gave her a choice which she took because of her daughter's illness. She had previously been terminated on suspicion of embezzlement. However, after further investigation, the termination was withdrawn and she returned to work (April).

4. Ms. Bobbitt has four indictments pending in Criminal Court for selling drugs. As a result of this fact, according to my account, she consulted with her attorney approximately 32 times and refused to answer 26 questions of importance. Her usual response was that upon the advise of her attorney pending the criminal prosecution, I respectfully decline to answer that (copies of indictments are attached).

5. Mr. Blackwell testified that in approximately November, 1980, he became aware of suspicions that Ms. Bobbitt was dealing in drugs; she had not told him; but at some point in time, she had told Mr. Leadbetter; that she had not admitted to him (Blackwell) she sold or delivered drugs to U.T. personnel; nor to anyone in his presence. He further testified that the termination of Mr. Gilbert was his decision; that there is no allegation that Mr. Gilbert brought drugs on U.T. premises, only that he got them delivered to him. Mr. Blackwell wrote the termination letter based on the information provided by Mr. Leadbetter.

6. Officer West testified that on 19 March, he "had been wired up by the Shelby County Attorney General's Office with a body microphone"; that he took Ms. Bobbitt to Judy's Restaurant for a coke and an order of french fries. As it began to get late, West indicated he should get her back to work. "She said, oh, don't worry about it. I'm secure exactly where I'm at. I said, well, what do you mean?" She said, "I don't have to worry about anything, that I sell to my boss, that I've got enough on my boss, and I sell him his ".

7. Four ladies worked in the same office as Ms. Bobbitt. They did not trust her; thought she didn't tell the truth; would say or do anything to make herself look better; had no knowledge of Gilbert using drugs nor of Ms. Bobbitt selling them; would point finger at anyone if it would help her, she obviously had no credibility with these ladies.

8. Mr. Gilbert testified that he had never taken speed in Ms. Bobbitt's presence and that she had never, on any occasion, delivered free or sold marijuana or quaaludes to him. He categorically denied any and all charges including the possibility of deliveries by Ms. Bobbitt's husband. He denied possessing any prescriptions for legal drugs and of ever taking drugs on the University campus or of coming to work under the influence of drugs or of possessing drugs on University campus. In fact, he denied taking drugs.

9. Mr. Gilbert testified he had no reason to believe Ms. Bobbitt was dealing in drugs or that she had a drug problem.

CONCLUSIONS

1. Ms. Bobbitt has absolutely no credibility with her female co-workers (work in the same office with her).
2. Mr. Gilbert is not quilty of the charges of purchasing or possessing illegal drugs on University premises or of taking drugs on University premises.
3. Mr. Gilbert should be re-instated in his position with compensation of all wages, salaries and fringe benefits due him since the day of his termination.

REASONS FOR MY FINDINGS

1. There appears to be no plausible explanation for Ms. Bobbitt's action in disclosing to Mr. Leadbetter, Officer West and the hearing examiner, that she delivered to or sold marijuana and occasionally quaaludes to Mr. Gilbert in his office other than the explanation that she could apparently say or do anything in an attempt to look good (in other words, play the role of a big shot). One or more of her co-workers stated that in her opinion, she wanted to have an affair with Mr. Gilbert; that she would point the finger at anyone, including Dr. Hunt, if she thought she could get by with it.
2. Based on the testimony in total, it would appear that Ms. Bobbitt had some vindictive reason for making charges against Mr. Gilbert. Possibly, the embezzlement charges placed against her that were dismissed for lack of evidence. No one saw any drugs delivered or observed Mr. Gilbert use drugs or under the influence of drugs or believed that he was under such influence.
3. Mr. Gilbert has been considered to be a good and capable employee. He received three substantial promotions

in approximately four years and seven months employment at UTCHS and insofar as the testimony or his personal file shows, no charges of any type had previously been placed against him.

/djw

Enclosures

cc: Mr. Ronald C. Leadbetter
Mr. Marc Baretz

Copies of indictments against Ms. Bobbitt filed in Criminal Court are attached and are to be considered a part of the record as agreed upon between the attorneys during Mr. Gilbert's hearing.

APPENDIX H

CHANCELLOR
VICE PRESIDENT FOR HEALTH AFFAIRS—
UNIVERSITY OF TENNESSEE
62 South Dunlap Street
Memphis, TN 38163
(901) 528-5509

September 14, 1981

Mr. James P. Gilbert
507 Garden Lane
West Memphis AR 72301

Dear Mr. Gilbert:

FINAL ORDER

By letter of May 20, 1981, Mr. Robert L. Blackwell, Vice Chancellor for Business and Finance, advised you of the termination of your employment as Cashier in the Business Office of UTCHS based on the following charge:

> Purchase and possession of illegal drugs on University premises.

The hearing of the above charge, conducted in accordance with The Uniform Administrative Procedures Act, Tennessee Code Annotated 4-5-108, et seq., was held by Dr. Samuel R. Bozeman, hearing examiner, on July 1, 1981.

Following the conclusion of the hearing, Dr. Bozeman prepared and conveyed to me, by memorandum of August 3, 1981, his findings of fact, conclusions and reasons. The essence of Dr. Bozeman's finding is that the foregoing charge against you is untrue and that you should be reinstated in your position and compensated for all lost salary and benefits.

I have carefully reviewed the record in this matter as well as Dr. Bozeman's findings and recommendations. Unfortunately, I cannot agree with Dr. Bozeman's findings and recommendations in your favor. To the contrary, I find that the charge against you is fully documented in the record and that a decision in your favor would be unwarranted and erroneous. It is therefore my decision to uphold your termination. My specific findings and reasons in support of my conclusion are as follows:

The chief witness against you (and sole witness claiming to have first hand knowledge of the matters underlying the charge) is currently under indictment for the felonious sale of marijuana and quaaludes. These criminal indictments were issued against Mrs. Bobbitt prior to your termination and, of course, prior to your hearing.

Notwithstanding the pre-existing criminal charges against her, Mrs. Bobbitt testified that she sold marijuana and quaaludes to you in your office on several occasions during the last year.

Mrs. Bobbitt's testimony regarding the charge against you was as follows:

> Q. Did you ever have any transaction with Mr. Gilbert other than University business?
>
> A. Yes.
>
> Q. What were those?
>
> A. On several occasions Mr. Gilbert would come to me and ask me if I could obtain drugs for him. I did in fact obtain the drugs and brought them to him in his office at UTCHS.
>
> Q. What kind of drugs?
>
> A. Marijuana, and on occasion, quaaludes.

Q. Did he pay you for those?

A. He paid a small sum each time.

* * *

Q. When did these transactions take place?

A. I am not sure I know what you mean.

Q. You said during the time that you were employed at UTCHS, is that when that was?

A. Right.

Q. Do you remember when the first time was that he asked you to obtain drugs for him?

A. I am not sure—about a year ago.

Q. Do you remember the last time?

A. Not specifically, you know. I mean, I would say near the end of my employment here. I am not sure about the dates [pp. 12-13].

I find Mrs. Bobbitt's testimony to be trustworthy and credible for several reasons. At the time Mrs. Bobbitt provided this testimony she was under criminal indictment and well aware of the severe consequences which might follow conviction for illegal sale of drugs. She was in fact represented by legal counsel at all times pertinent to this case and, particularly, during the course of the hearing. Mrs. Bobbitt was aware that she already faced possible imprisonment for the illegal drug activities for which she had previously been indicted [pp. 47-48]. Significantly, she had not been indicted for the activities she admitted to at the hearing. In other words, she did not merely admit to activity already known to and provable by the District Attorney's Office. To the contrary, only two individuals had first hand knowledge of the drug

transactions testified to by Mrs. Bobbitt, you and she. Since it is safe to assume that you would not implicate yourself by coming forth and revealing the occurrence of these illegal transactions, Mrs. Bobbitt could have completely avoided even the possibility of criminal prosecution for these transactions by remaining silent. Therefore, her volunteer admission that she illegally sold marijuana and quaaludes to you in your office constitutes a strong and unequivocal statement against interest, establishing the prospect of criminal prosecution where no such prospect previously existed.

It should also be noted that Mrs. Bobbitt pleaded not guilty to the criminal charges for which she was indicted [pp. 32-33, 47]. The admissions made by Mrs. Bobbitt during the hearing certainly foreclose her from ever contending at the trial of the criminal charges that she has never engaged in the sale of illegal drugs. For this additional reason, her admissions constitute a strong statement against interest and are therefore worthy of belief.

Dr. Bozeman's speculation that Mrs. Bobbitt offered her testimony "in an attempt to look good (in other words, played the role of a big shot)" is completely without merit. Mrs. Bobbitt currently faces imprisonment in the state penitentiary if convicted on current charges and is hardly likely to increase the chance of conviction and spending additional time in the penitentiary by admitting to additional illegal acts.

Even Dr. Bozeman recognized the implicating nature of Mrs. Bobbitt's testimony:

> HEARING EXAMINER: It seems to me that her testimony could work against her just as well as it could work for her.

MR. BARETZ: Well, she hasn't said very much today.

HEARING EXAMINER: I think she's said quite a bit; and if Mr. Gilbert is found guilty of purchasing drugs from her, it would seem the court would hold that against her [p. 51].

It is certainly predictable that the criminal court would hold any additional illegal drug activity against Mrs. Bobbitt—which is precisely why I do not believe she would testify that she had sold marijuana and quaaludes to you if she had not in fact done so.

Despite some speculation to the contrary by your legal counsel, it is also clear that Mrs. Bobbitt's testimony was not offered for her benefit as part of an arrangement with the District Attorney's Office. Mrs. Bobbitt clearly and repeatedly denied that any arrangement whatever had been made with the District Attorney's Office whereby she would receive some consideration in exchange for her testimony against you [pp. 37-50, 53]. Mrs. Bobbitt plainly stated that she appeared as a volunteer and not in connection with the pending criminal prosecution:

Q. (By Mr. Baretz) Ms. Bobbitt, do you hope to gain anything out of this testimony?

A. No, sir.

Q. You don't?

A. *I am here as a volunteer. Mr. Leadbetter called me and asked me if I would appear as a witness.*

Q. I see. Well, how come you are here as a volunteer and only prepared to say one or two things and not prepared to volunteer any more information, Ms. Bobbitt?

A. Under the advice of my attorneys, due to the pending criminal prosecution against me, I respectfully decline to answer that question.

Q. Isn't it true, Ms. Bobbitt, that you were just trying to help yourself out and that's why you are here today? *Your sole basis of being here is to help yourself out with your charges in Shelby County, isn't that a fact of truth?*

A. *No.*

Q. *That's not?*

A. *No, sir.*

. . .

Q. (By Mr. Baretz) *Why are you here as a volunteer?*

A. *Mr. Leadbetter called me and asked me if I would come and witness* [pp. 52-54].

The record contains no evidence whatever that Mrs. Bobbitt testified in exchange for any benefit offered by the District Attorney's Office. Moreover, it is certainly unreasonable to assume that *any* person would admit to additional criminal activity for the purpose of obtaining a reduced sentence on existing criminal charges. The record shows that Ms. Bobbitt was promised nothing in exchange for her testimony [Testimony of Denise Bobbitt, pp. 52, 53; testimony of Robert Blackwell, p. 90].

Dr. Bozeman is correct in his finding that Mrs. Bobbitt repeatedly refused to answer cross-examination questions regarding the number of times she delivered drugs to you and the dates on which those deliveries occurred. She refused to do so on advice of legal counsel [pp. 13, 21, 27] for the simple and obvious reason that each separately item-

ized sale of an illegal drug constitutes a separate criminal offense. By itemizing the criminal transactions in which she engaged with you, Mrs. Bobbitt would likely have laid the groundwork for the filing of additional felony counts against her by the District Attorney's Office (keeping in mind that the transcript of this hearing was taken under oath). While Mrs. Bobbitt volunteered to testify against you at Mr. Leadbetter's request, it is reasonable to assume that she did not desire to testify in a manner which might readily lead to the filing of additional charges and the imposition of additional criminal sanctions.

Dr. Bozeman placed great weight on the opinion of several female co-workers that Mrs. Bobbitt lacked credibility, and that her testimony should be considered untruthful on that basis. Dr. Bozeman found, in particular, that the four ladies who worked in the same office with Mrs. Bobbitt do not trust her, thought she didn't tell the truth, and she "would say or do anything *to make herself look better.*"

The testimony of these witnesses in fact confirms Dr. Bozeman's finding *taken in proper context.* For example, when asked to give an example of Mrs. Bobbitt's lack of credibility, witness Rebecca Lucas testified that Denise Bobbitt had told her that her husband had sent her a dozen red roses the day after another girl in the office had received roses from her husband—the implication being that Mrs. Bobbitt did not receive any roses but wanted her co-workers to believe that she had. Ms. Lucas further explained her opinion of Mrs. Bobbitt's credibility by saying, "She is the type of person that she did everything—no matter what discussion you were on, she had done it previous or was going to do it" [p. 123]. Witnesses testified consistently that Mrs. Bobbitt exaggerated and even lied in order to *"make herself look better".* However, no witness testified that Mrs. Bobbitt ever exaggerated or lied in order

to make herself look worse. For example, witness Sally Murphree, whose testimony clearly evidenced her personal dislike for Mrs. Bobbitt, testified:

> Q. Let me ask you again for your opinion—you were testifying as to her credibility, etc. The occasions that you have observed her telling what at least in your observation is a lie, has that ever been something that would reflect negatively on her, or is it generally something to make her look better?
>
> A. *It usually looks better.*
>
> * * *
>
> Q. Suppose hypothetically, as well as you know her, she had come to you and said, hey, I think you ought to know I sell drugs. Would that have shocked you?
>
> A. Well, it would shock me as much as she would tell me.
>
> Q. Why would that be?
>
> A. Well, *because she wanted to be a goody-good person.*
>
> Q. *So you don't think she would come and say, I sell drugs, particularly if it wasn't true, do you?*
>
> A. *No. I don't think she would say it* [pp. 145-146].

Witness Diane Cramer testified in similar fashion:

> Q. I have one other question. Did she [Denise Bobbitt] always tell lies or just sometimes, as far as you know, in your opinion?
>
> A. I can't say that she all the time tells lies.

Q. Well, *when she tells lies, or makes statements that you perceive to be lies, are they good to make her look better or worse or how?*

A. *No. They are good to make her look better.*

Q. *Have you ever known her to tell a lie, again in your perception, where she's made herself look worse or harm to her own interest?*

A. *No* [p. 163].

In sum, there is evidence that Mrs. Bobbitt has not always been an honest forthright person. But there is absolutely no evidence that she does more than fabricate tales for the purpose of enhancing her own image among her fellow workers, and perhaps, others. There is no evidence that she lies or exaggerates for the purpose of making herself look bad.

Without a doubt, the testimony provided by Mrs. Bobbitt did nothing to enhance her, and it certainly did not in any manner make her "look good" or a "big shot". To the contrary, Mrs. Bobbitt's testimony completely destroyed the "goody-good" image she sought to maintain and confirmed her participation in criminal drug activity. Therefore, it is clear that Dr. Bozeman's finding regarding Mrs. Bobbitt's credibility failed to recognize the context in which her co-workers attacked her credibility. Again, the record supports, without reservation, Mrs. Bobbitt's credibility in the circumstances in which her testimony was given.

Although it is true that you denied the charge against you, I find that your denial, standing alone, serves as nothing more than a response to the charge. I must go beyond a mere denial of guilt and look to the evidence supporting or refuting the denial. In your case, the evidence strongly

supports the truth of the charge and the falsity of the denial.

CONCLUSION

For the foregoing reasons, it is my decision that the charge against you is true and the termination of your employment should be upheld.

RIGHT OF APPEAL

Should you desire to appeal my decision, you may do so by filing a petition for review in a chancery court having jurisdiction within sixty (60) days after the date of this Final Order.

Sincerely,

/s/ James C. Hunt
James C. Hunt, M.D.
Chancellor

JCH: hn/gh

cc: Mr. Marc Baretz
Mr. Ronald C. Leadbetter
Mr. Robert L. Blackwell
Samuel R. Bozeman, Ph.D.

APPENDIX I

(Filed January 7, 1985)

No. Shelby Equity Number 23

IN THE SUPREME COURT OF THE STATE OF TENNESSEE AT JACKSON

JAMES P. GILBERT,

Appellant,

vs.

JAMES C. HUNT, M.D., INDIVIDUALLY AND AS CHANCELLOR OF THE UNIVERSITY OF TENNESSEE CENTER FOR HEALTH SCIENCE,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James P. Gilbert, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of Tennessee concurring in the results and thereby affirming the Judgment entered by the Court of Appeals of Tennessee, Western Division, of September 26, 1984; with said Order of the Supreme Court entered in this action on December 10, 1984.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2) and Supreme Court Rule 10.

Respectfully submitted,

JAMES P. GILBERT, Appellant
By: /s/ Marc I. Baretz
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CERTIFICATE OF SERVICE

I, one of the attorneys for the Appellant, state that I have served a copy of the foregoing on the attorneys of record, by depositing a copy thereof, postage prepaid, in the United States Mail and addressed as follows:

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Office of Attorney General
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Nashville, TN 37219

this 4th day of January, 1985.

/s/ Marc I. Baretz
Marc I. Baretz

(2)

Supreme Court, U.S.
FILED
APR 2 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1429

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES GILBERT,
Appellant,

vs.

UNIVERSITY OF TENNESSEE, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF TENNESSEE AT JACKSON

MOTION TO DISMISS

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INDEX

TABLE OF AUTHORITIES II
MOTION TO DISMISS 1
THE STATE STATUTE INVOLVED 1
RESTATEMENT OF THE QUESTION PRESENTED 2
THE PROCEEDINGS BELOW 2

ARGUMENT:

I. The Federal Question Sought to Be Reviewed Was Not Timely Raised Within the Period Required by Law, 28 U.S.C. § 2101(c) 5
II. Appellant Does Not Present a Substantial Federal Question for Review by This Court 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Cox Broadcasting Corp. v. Cohn, 420 U.S. 478 (1975) 7
Federal Trade Commission v. Allentown Broadcasting Corp., 349 U.S. 358 (1955) 9
Northern Pipeline Const. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 9
United States v. Raddatz, 447 U.S. 667 (1980) 8, 9
Universal Camera Corp. v. National Labor Rel. Bd., 340 U.S. 474, 496-497 (1951) 9

Federal Statutes

28 U.S.C. § 1257(2) 5
28 U.S.C. § 2101(c) 1, 5

State Statutes

T.C.A. §§ 4-5-108 - 4-5-120 2
T.C.A. § 4-5-120(a) 2, 3, 4, 5, 6, 7
T.C.A. § 4-5-301, et seq. 2
T.C.A. § 4-5-117 ..... 3, 4, 6

No. 84-1429

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES GILBERT,
Appellant,

vs.

UNIVERSITY OF TENNESSEE, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF TENNESSEE AT JACKSON

MOTION TO DISMISS

Appellees move the Court to dismiss the appeal herein on the following grounds:

1. The federal question sought to be reviewed was not timely raised within the period required by law, 28 U.S.C. § 2101(c).

2. Appellant does not present a substantial federal question for review by this Court.

THE STATE STATUTE INVOLVED

The jurisdictional statement fully sets forth the state statutes involved; those need not be repeated here.

RESTATEMENT OF THE QUESTION PRESENTED

Does Tennessee Code Annotated § 4-5-120(a) violate the due process clause of the Fourteenth Amendment to the U. S. Constitution by permitting the appointment by a state agency of a hearing examiner to conduct a hearing of disciplinary charges against a state employee but requiring the final decision to be made by the agency upon its review of the administrative record?

THE PROCEEDINGS BELOW

This action originated under the "contested cases" provision of The Tennessee Uniform Administrative Procedures Act, Tennessee Code Annotated §§ 4-5-108 - 4-5-120 (herein called APA).[1] The basic facts giving rise to the action are undisputed and are well stated by the Tennessee Court of Appeals' decision of January 31, 1983 [Jurisdictional Statement, A3-A8]. Such facts may be summarized as follows:

On May 20, 1981 appellant received a letter advising him that his employment as cashier in the Business Office of The University of Tennessee Center for the Health Sciences would be terminated on the basis of a charge that he purchased and possessed illegal drugs on University premises.

Appellant requested, and was afforded, a hearing pursuant to the provisions of the APA to contest his termination. Pursuant to § 4-5-120(a) of the APA, Dr. James C.

---

1. T.C.A. §§ 4-5-109 - 4-5-133 were transferred or repealed by Acts of 1982 (Adj. S.) Ch. 874. T.C.A. § 4-5-120, herein involved, was repealed by § 36 of Acts of 1982, Ch. 874. For new law, see T.C.A. § 4-5-301, et seq.

Hunt, Chancellor of The University of Tennessee Center for the Health Sciences, appointed Dr. Samuel R. Bozeman, a member of Dr. Hunt's staff, to conduct a hearing and present findings to him for his consideration, following which Dr. Hunt would make the final decision.

The hearing was conducted and a transcript of the hearing was prepared. By memorandum of August 3, 1981 Dr. Bozeman forwarded his findings and recommendations to Dr. Hunt [Jurisdictional Statement, A36-A41]. Therein, Dr. Bozeman concluded that the plaintiff was not guilty of the charge against him and that plaintiff should be reinstated to his position.

Thereafter, Dr. Hunt carefully reviewed the record in this matter, including the hearing transcript, and concluded that plaintiff was guilty of the charge against him. Dr. Hunt, in his "Final Order," detailed fully the basis for his decision and disagreement with the hearing examiner [Jurisdictional Statement, A42-A51]. Following such decision, appellant, pursuant to T.C.A. § 4-5-117, filed a timely petition with the Chancery Court of Shelby County, Tennessee seeking judicial review of Dr. Hunt's decision. The administrative record was filed with the Court, and both parties moved for summary judgment on the basis of such record.

The Chancery Court subsequently ruled that T.C.A. § 4-5-120(a), to the extent it requires the agency to enter the final order, violates the substantive and procedural due process rights of appellant. It was the Chancery Court's opinion that appellant's due process rights under the Fourteenth Amendment were violated because the APA vested the final decision-making authority in someone other than the hearing examiner. No authority was cited to support such holding. Appellees appealed the

Chancery Court decision to the Tennessee Court of Appeals, raising a single question as follows:

> Did the Chancery Court err in holding that the provisions of The Uniform Administrative Procedures Act, T.C.A. § 4-5-120(a), which requires the agency, acting through an individual other than the hearing examiner, to enter the final order violate plaintiff's substantive and procedural due process rights under the Fourteenth Amendment?

On January 31, 1983 the Court of Appeals entered judgment for appellees, holding that T.C.A. § 4-5-120(a) was constitutional, and remanding the case to the Chancery Court for review of Dr. Hunt's decision in accordance with the standard of review stated in T.C.A. § 4-5-117 [Jurisdictional Statement, A1-A10].

Appellant subsequently applied to the Tennessee Supreme Court for permission to appeal the Court of Appeals' decision on the constitutional issue. On April 4, 1983 the Tennessee Supreme Court denied plaintiff's application, which was the final judgment of the state court on this issue [Jurisdictional Statement, A11].

The Chancery Court thereafter reviewed the merits of Dr. Hunt's decision according to the standard provided by T.C.A. § 4-5-117, and entered judgment in favor of appellees. Appellant appealed this decision to the Tennessee Court of Appeals on several grounds, including the claimed unconstitutionality of T.C.A. § 4-5-120(a).

On September 26, 1984, the Court of Appeals ruled in appellees' favor on all issues. Appellant's second attack on the constitutionality of T.C.A. § 4-5-120(a) was summarily rejected by the Court of Appeals, which ruled that its previous ruling on the same issue, with application for

permission to appeal to the Tennessee Supreme Court having been denied in April 1983, was *res judicata* [Jurisdictional Statement, A14].

Appellant thereupon applied for permission to appeal this decision to the Tennessee Supreme Court, which, by order of December 10, 1984, denied the application [Jurisdictional Statement, A21].

Appellant now appeals to this Court pursuant to 28 U.S.C. § 1257(2), claiming that T.C.A. § 4-5-120(a) "violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution to the extent said statute permitted a state agency (The University of Tennessee) to appoint a hearing examiner to conduct a hearing of disciplinary charges against a state employee (Gilbert) but requiring the agency to make the final decision based on its review of the entire record of the disciplinary proceedings, where the agency (acting through Dr. Hunt) did not personally observe the witnesses at the hearing."

ARGUMENT

I

The Federal Question Sought to Be Reviewed Was Not Timely Raised Within the Period Required by Law, 28 U.S.C. § 2101(c)

The Tennessee Court of Appeals, in its judgment and opinion of January 31, 1983, specifically addressed the issue of whether "T.C.A. § 4-5-120(a), which requires the agency, acting through an individual other than the hearing examiner, to enter the final order, violated the substantive and procedural due process rights of the plaintiff"

[Jurisdictional Statement, A5]. The Court of Appeals ruled:

> We must therefore hold that T.C.A. § 4-5-120(a) is constitutional and does not violate the plaintiff's substantial [sic] and procedural due process rights in the manner in which it was applied. As a result, we sustain the issue presented for review by the defendant as to this question [Jurisdictional Statement, A9].

The Court of Appeals, however, remanded the case to the Chancery Court only for the purpose of reviewing Dr. Hunt's decision in accordance with the standards of T.C.A. § 4-5-117 [Jurisdictional Statement, A10].

Appellant applied for permission to appeal the judgment of the Court of Appeals to the Tennessee Supreme Court. However, the Tennessee Supreme Court denied Gilbert's application on April 4, 1983, which constituted the final judgment of the state court on this issue [Jurisdictional Statement, A11].

The Chancery Court thereafter reviewed the merits of appellant's case and entered judgment in favor of appellees [Jurisdictional Statement, A33-A35].

Appellant again sought to challenge the constitutionality of T.C.A. § 4-5-120(a) in his appeal of this adverse decision of the Chancery Court. However, the Court of Appeals quickly disposed of this new challenge, saying:

> We dispose of this last issue by simply stating that it was presented to this Court in an earlier appeal of this case and by an opinion filed January 31, 1983, it was decided in favor of the University. Application for permission to appeal in that case was denied in April, 1983. Therefore, our former opinion is *res judicata* as to this issue [Jurisdictional Statement, A14].

Clearly, Gilbert's federal claim was finally adjudicated by the Tennessee state courts on April 4, 1983. In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 478 (1975), this Court noted:

> In the third category [situations in which state courts rule on a federal issue and yet there are further proceedings in the state courts] are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review. The Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts [p. 481].

In the instant case, it is plain that the 1983 ruling of the Tennessee Supreme Court was final and that appellant was foreclosed from again presenting his constitutional challenge to T.C.A. § 4-5-120(a) to the state courts. Accordingly, the period within which appellant was required to appeal the final decision of the state courts on this federal issue commenced on April 4, 1983.

And, since the notice of appeal to this Court was filed on January 7, 1985, more than twenty-one months after the issue of the constitutionality of T.C.A. § 4-5-120 (a) was finally disposed of by the Tennessee courts, appellant's appeal is untimely.

II

Appellant Does Not Present a Substantial Federal Question for Review by This Court

It is noteworthy that appellant cites not a single case in support of his position, and we are unaware of any decision by this Court which holds that due process requires the final decision-maker to hear and see the witnesses. Such a rule would negate the "clearly erroneous rule" applicable to review of factual matters by federal courts of appeals and references by trial courts to magistrates and special masters.

Indeed, the issue raised by plaintiff has been well settled by this Court. In *United States v. Raddatz,* 447 U.S. 667 (1980), this Court expressly considered the ruling of the Court of Appeals for the Seventh Circuit that the due process provisions of the Fifth and Fourteenth Amendments require the decision-maker "personally to hear the controverted testimony [where credibility is crucial to the outcome]," *Id.,* at 672. This Court rejected and reversed the Court of Appeals' ruling, saying:

> Generally, the ultimate fact-finder in administrative proceedings is a commission or board, and such trier has not heard the witnesses testify [citation omitted]. While the commission or board—or an administrator —may defer to the findings of the hearing officer, that is not compelled. See, e.g. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *NLRB v. Mackay Radio & Tel. Co.,* 304 U.S. 333, 350-351, 58 S.Ct. 904, 912-913, 82 L.Ed. 1381 (1938); *Morgan v. United States,* 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936); *Utica Mutual Insurance Co. v. Vincent,* 375 F.2d 129, 132 (Ca. 2)

(Friendly, J.) cert. denied, 389 U.S. 839, 88 S.Ct. 63, 19 L.Ed.2d 102 (1967) [*Id.*, 447 U.S. at p. 680].

The final decision-maker has "broad discretion to accept, reject or modify [the fact-finder's] findings." *Id.*, p. 680.

Similarly, this Court recently confirmed that the Constitution not only permits, but may require, a decision-maker to decide a case independent of the recommendations of a fact-finder. *Northern Pipeline Const. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). There, the Court made specific reference to the 1978 Federal Magistrate's Act (where the "magistrate's proposed findings and recommendations were subject to de novo review by the District Court, which was free to rehear the evidence or to call for additional evidence."), the pre-1973 bankruptcy rules (where "the district judge, after hearing the report of the magistrate, was free to 'modify it or . . . reject it in whole or in part . . . receive further evidence or . . . recommit it with instructions' "), and federal legislation establishing the United States Employees Compensation Commission (where the federal district court "had the sole power to enforce [a Commission order] or set it aside, depending upon whether the Court determined it to be 'in accordance with the law' and supported by evidence in the record."), *Northern Pipeline*, 458 U.S. pp. 78-79. See also *Federal Trade Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Universal Camera Corp. v. National Labor Rel. Bd.*, 340 U.S. 474, 496-497 (1951).

Appellant cites no authority whatever in contradiction to the rulings of this Court on the issue here presented.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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